No. 2503

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. B. HAMMOND,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

PART TWO

Comprising

QUESTIONS OF LAW FOR DETERMINATION.

NOTE: Citations to pages supra 1 to 117 will be understood as referring to Part One of our brief. Table of Cases cited herein will be found on pages next preceding this.

Synopsis and Index to Part Two of Brief.

Page

TOPIC IV

APPENDIX I

APPENDIX II

TOPIC I (Continued).

2. UNDER THE LAW DEFENDANT DID NOT SUSTAIN ANY SUCH RELATION TO THE ALLEGED CONVERSIONS AS TO MAKE HIM LIABLE THEREFOR.

Plaintiff's theory as to the basis of defendant's responsibility was covered by the Court in an instruction to the jury which is set forth at pages 51 et seq., supra.

Upon the hearing in this Court no precedent or principle was cited or relied upon to sustain a recovery herein and we confess to lacking the imaginative power necessary to outline some legal theory upon which defendant's liability can be sustained. We, therefore, cannot propound a theory and then demonstrate wherein its application to the case of defendant would be fallacious. A painstaking search of the American and English decisions has not disclosed a single case where any Court has even been asked to fasten responsibility upon an individual for the acts of others upon evidence of the character adduced herein. Much less, of course, can any precedent be found to sustain a finding of liability upon such evidence.

Analyzed, the basis of defendant's liability in the premises must be found rooted in the fundamental principles of agency, in the consideration of which we could not hope to enlighten this Court. We can only beg of this Court a patient review of the evidence which we earnestly believe is comprehensively gathered together in pages 51-117 supra.

Failing utterly, as does the evidence, to establish any specific or actual relation of agency between defendant

and the persons or corporations who it is alleged committed this conversion, it but remains to consider what legal responsibility inheres merely from the fact that defendant may have been an officer of or stockholder in a corporate wrongdoer. In this connection the evidence shows that defendant was nominally the manager and director of Montana Improvement Company for a while; possibly a director in Blackfoot Milling & Manufacturing Company; a director of Big Blackfoot Milling Company and for a while president, and at all the times mentioned in the complaint after the organization of Missoula Mercantile Company in August, 1885, a director of the company last mentioned.

That the relationship of one to a corporate wrongdoer as president, director or stockholder does not in and of itself make such an one liable for torts committed by the corporation is thoroughly well established.

In Folwell v. Miller, 145 F. 495; 75 C. C. A. 489, an endeavor was made to hold the president of a corporation, publishing a newspaper, who was also its editor-in-chief and principal stockholder, personally and civilly liable for a libel published in the newspaper. The Circuit Court of Appeals for the Second Circuit in denying any liability, through Wallace, C. J., said:

> "That the defendant was not liable merely because he was president of the corporation and a stockholder is a proposition that does not require extended discussion. The president of a corporation is an agent of very extensive, but not unlimited, powers. He is not personally liable because of his official capacity, any more than are

> the directors or stockholders for torts committed by the corporation in the absence of personal participation in the tortious act. As an agent he is not liable for the acts of misfeasance or nonfeasance of his subordinate agents or employees (Citing cases) * * *''.

The Court then considers the liability of defendant because of his relation to the newspaper as editor-in-chief and in concluding that there was no liability on this head, said:

> ''The owner of a newspaper is liable for whatever may be published in it, because all those who are engaged in preparing and publishing it are his servants, and the publishing is an act within the scope of their employment. It is therefore deemed the act of the owner himself, and, although done without his knowledge, or contrary to his express instructions, he must bear the consequences. The same principle applies to every tort committed by a servant in the course of his employment, whether it is a mere neglect, or a tort of a wilful and malicious quality. The editor-in-chief, however, exercises a delegated authority for the owner, and consequently, is but an agent of the owner, even though he be editor-in-chief. His subordinates are not his agents or servants because the power to select them and discharge them belongs to the owner, and they are not under his control when that power resides in a higher agent, notwithstanding he is permitted to control them when the owner does not see fit to intervene. It is impossible to differentiate the relation of an editor and proprietor from that of an agent and principal. We conclude that the trial judge correctly ruled that the defendant was not liable for the act of his subordinate under the circumstances of this case.''

TOPIC II.

THE COURT SHOULD HAVE INSTRUCTED THE JURY TO FIND A VERDICT FOR DEFENDANT INASMUCH AS IT APPEARED THAT ANY TIMBER, WHICH MAY HAVE BEEN TAKEN, WAS CUT PRIOR TO THE TAKING EFFECT OF THE ACT OF MARCH 3, 1891, AND THAT SUCH TIMBER WAS CUT BY RESIDENTS OF THE STATE OF MONTANA AND USED IN THE STATE OF MONTANA FOR THE PERMITTED PURPOSES.

The Act of March 3, 1891, Ch. 561, 26 Stat. L. 1095, entitled "An Act to Repeal Timber Culture Laws and for Other Purposes" is a most comprehensive statute embracing much of the public land legislation which was formulated by the session of Congress which came to an end on the date of the enactment of said Act, namely, March 3, 1891. In a note appended to Section 1 of said Act, to be found at 6 Fed. Stats. Ann. 497, 498, will be found a convenient and brief reference to the topics respectively treated in the twenty-four sections embraced in the Act. In passing we would here note that Section 7 of the Act—6 Fed. Stats, Ann. 525—provides among other things that where two years have expired after the issuance of a final receipt and no contests have been initiated, that the entryman should then become entitled to a patent. Addressing itself to this section of the law the Supreme Court of the State of Montana characterized it as "a remedial statute, a statute of repose."

> Graham v. Great Falls Water Power Company, 30 Mont. 393; 76 Pac. 808.

The first sentence of Section 8 of said Act—6 Fed. Stats. Ann. 526—contains the statute of limitations

which recently has been before our Circuit Court of Appeals and in which it was held that active concealed fraud prevented the running of the limitation therein provided, which limitation is that suits to annul patents shall only be brought within six years after the date of the issuance of such patents.

Linn & Lane Timber Co. v. U. S., 203 Fed. 394;
121 C. C. A. 498;
Affirmed, 236 U. S. 574.

We thus at the outset find we are construing a statute which throughout evidences the desire of Congress to condone and put at rest controversies and uncertainties which were but productive of evil alike to the interests of the United States Government as a proprietor and the settler, who had been having and was then having a difficult struggle in the development and upbuilding of the West. Immediately following this first sentence in said Section 8 is the provision with which we are here specially concerned:

> "Sec. 8. * * * And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and in the District of Alaska and the gold and silver regions of Nevada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same; but nothing herein contained shall apply to operate to enlarge the rights of any railway company to cut timber on the public domain; *provided,*

That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this section." (26 Stat. L. 1099.)

On the same day as this Section 8 was enacted as a part of the so-called Act of March 3, 1891, another statute was enacted entitled "An Act to Amend Section 8 of an Act Approved March 3, 1891, entitled 'An Act to Repeal Timber Culture Laws and for Other Purposes' ". The amending Act last mentioned is known as Chap. 559 and will be found at 26 Stat. L. p. 1093. As said Section 8 was amended by this Act, the language remained the same as to the time within which suits should be brought to annul or set aside patents and it then proceeds as follows:

"And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and in the District of Alaska, and the gold and silver regions of Nevada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing or domestic purposes *under rules and regulations made and prescribed by the Secretary of the Interior* and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, Provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, *and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third,*

eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.'' (26 Stat. L. 1093.)

The italics in the foregoing quotation are our own and serve to point out the additions which the amending Act made to Section 8 as contained in the original Act.

Section 8 in its two forms will be found in the text and notes, 7 Fed. Stats. Ann. p. 306.

A careful reading of the Congressional Record has failed to disclose which Act was first signed by the President and it would at least seem morally certain that the original Act had not been approved by the President at the time when the amending Act went through the House and Senate. We have been credibly informed that there is no record at the White House to indicate which Act was in fact first approved by the President.

We are not clear that these considerations are of particular moment. The amending Act presupposes an existing enactment. If in fact there was not such an existing enactment then it would seem as though the amending Act would have nothing to operate upon, hence would be void, and the original Act when it was signed by the President would necessarily become law. On this theory, then, we are not concerned with the amending Act. If, on the other hand, we must assume that the original Act became a law and it is only on the theory that it was an existing law that any force can be given to the amending Act, then we have a situation where, if it be only for a moment of time, Section 8 as it was originally enacted, became and was

the law of the land and if Section 8 as originally enacted contains a condonation of a more liberal character than found in the amending Act, we contend that it was not possible, as against constitutional guaranties, to restore liability for the Acts condoned.

Section 8 as originally adopted was retrospective as well as prospective in its operation and it furnished a clean bill of health as to timber cut in the past, and, for that matter, as to the future in the event that the Secretary of the Interior made no rules in pursuance of the section, or if he made rules in the future and these rules were observed.

Section 8, as amended, we think, made it clear that as to the future it would be a prerequisite to the right to cut timber on the public domain that the Secretary of the Interior should have made rules and that these rules should have been complied with and, as a matter of fact, a comprehensive set of rules and regulations were very soon promulgated by the Secretary of the Interior and it was under such that the "Timber Permit" (a copy of which is set forth in Tr. at pp. 462 et seq.) was issued to Big Blackfoot Milling Company. The application or petition for this timber permit is set forth (Tr. p. 450), also some correspondence (Tr. pp. 467-8) by which the permit was made effective for Big Blackfoot Milling Company instead of Blackfoot Milling & Manufacturing Company, which had made the application.

Our contention is that the retrospective operation of the statute as originally adopted was never repealed

or amended—and indeed could not be as a matter of constitutional law were it otherwise intended—by the amending Act. Maybe the true rule is that the two Acts should be construed together and thus an attempt to do an unconstitutional Act need not be attributed to Congress, in which event we would have Section 8 as it was originally enacted remaining effective so far as it operated retrospectively and as to the future that said section as amended furnishes the sole authority.

We have already observed that the conferring of this "defense" is found in the same section as is the statute of limitations providing within what time suit should be brought to annul patents and it is certainly about as clumsy a way as could be imagined of making provision for the issuance in the future of permits to cut timber on the public lands by the Secretary of the Interior, if that was all that was intended by Congress. We believe that by this legislation Congress intended and endeavored to wipe the slate clean as to all cases where timber had been cut by bona fide residents and had been used in the territory or state where cut for the purposes named in the Act and this we apprehend to be the ruling of the Supreme Court of the United States in the case of

> Northern Pacific Railroad Co. v. Lewis, 162 U. S. 366, 377; 40 L. Ed. 1002.

That was an action by persons who cut timber on the public lands against Northern Pacific Railroad Company to recover damages for the loss of that timber caused by fire alleged to have occurred through the

negligent operation of the defendant's railroad. The Supreme Court of the United States held that plaintiffs had failed to show any title in the property or such right of possession thereto as would enable them to maintain the action. The statement of facts in the case shows that the cutting of this timber was done in *1889 and 1890.* Plaintiffs attempted to show title in themselves by virtue of the Mineral Land Act of June 3, 1878, contending that where no evidence was given upon the subject the presumption should be that they had complied with the provisions of that Act and that the cutting was, therefore, legal and the timber was their own property. As to this defense Mr. Justice Peckham, delivering the opinion of the Court, found there was no evidence tending to show that the lands where the wood was cut were mineral or that in cutting, handling or removing the wood the plaintiffs had complied, or attempted to comply with the provisions of the Act, or with the rules or regulations prescribed by the Secretary of the Interior. In disposing of plaintiff's contention the Court held that the right to cut was exceptional and quite narrow and that it was for plaintiffs to show that they had complied with the statute.

Addressing itself to the two Acts of March 3, 1891, the Court, pp. 377-8, says:

> "Nor did the plaintiffs obtain any rights under Section 8 of the laws of Congress approved March 3, 1891, entitled 'An Act to Repeal Timber Culture Law and for Other Purposes.' 26 Stat. at L. 1099. That section was amended by the act approved on the same day, March 3, 1891, 26 Stat. at L. 1093. Neither section grants any relief to one situated like the plaintiffs. The section in

> either act looks to a criminal prosecution or civil action by the United States for trespass upon public timber lands to recover for the timber and lumber cut thereon, and it is provided that it should be a defense if the defendant should show that the timber was so cut or removed by a resident of the state or territory for agricultural, mining, manufacturing, or domestic purposes, and had not been transported out of the same. If the plaintiffs had shown these facts they would have proven enough to sustain their case on this point. They showed nothing upon the subject."

There seems to be no escape from the ruling of the Supreme Court that had these plaintiffs shown themselves to be bona fide residents of the State of Montana and that the timber they had cut was in good faith intended to be used for the purposes permitted by the Act that then they would have been furnished with a good defense had the Government been the party plaintiff seeking recovery for the timber.

Be this as it may and, perhaps, it may be charged that in saying it, it was but *obiter,* nevertheless the Supreme Court of the United States plainly indicates that the Acts of March 3, 1891, had a retrospective operation and of necessity if these Acts are to be given a retrospective operation, obviously, as to such retrospective operation, the requirement that the cutting be done under rules and regulations to be prescribed by the Secretary of the Interior, cannot apply, because there never were any such rules and regulations prior to the passage of the Acts, and we respectfully submit that this ruling should be sufficient for the proper disposition of the case at bar.

The disposition and use of the product cut at Bonner and Bonita is summarized at pages 113 et seq., supra, and shows that all the timber alleged to have been converted was cut by bona fide residents or citizens of the territory of Montana and used for the purposes prescribed by the Act within the territory of Montana.

It furthermore appears that substantially all the timber, with the conversion of which defendant is charged, was severed not later than 1891.

As to the Hellgate timber Fenwick testified that he cut along the Hellgate from May, 1886, to May or June, 1891, and that during the years 1890 and 1891 his operations were very small, supra p. 71. Here we must recall that Fenwick was cutting indiscriminately on land which afterwards upon survey became odd numbered sections. There is no evidence (*we say this advisedly*) that any of the timber alleged to have been taken from the Hellgate lands *described in the complaint* was cut subsequent to 1890.

As to the Blackfoot country for the purposes of the present topic much of it could be most simply disposed of by giving due weight to the consideration that the Government, as to several claims, had lost the right to the timber growing thereon prior to March 3, 1891, owing to the earlier date of the initiation of the settlers' right subsequently ripening into a patent—which dates respectively are established by stipulation (Tr. 743). If the testimony shows a cutting at a later date than that of such initiation, then, obviously, there was no conversion. If the cutting was earlier, then the protection afforded by the Acts of March 3, 1891, applies. Needless

to say, the plaintiff's testimony, such as it is, was directed to the establishment of conversions prior to the date of such initiation.

We shall, therefore, briefly review, claim by claim, the cuting on the Blackfoot, mainly with the end in view of showing such cutting either to have been prior to March 3, 1891, or, if subsequent thereto, that in fact no conversion was proved against any one. In several instances we shall find both conditions concurring. In some, details will be given which are of importance only in the consideration of other errors, but it is thought best to marshal all the facts concerning each claim once and for all.

Taking the claims in the order in which they appear in the stipulation (Tr. 743) they are as follows:

Cunningham Claim:

This—the N. W. ¼ Sec. 34-14-14, was a pre-emption cash entry made by Elijah F. Cunningham April 1, 1890 (Tr. 743-4). As the Government has no right to recover for any timber cut thereon subsequent to April 1, 1890, it is obvious that any conversion for which there might be a recovery must be within the retrospective operation of the Acts of March 3, 1891. Dan Graham testified (Tr. 71) that in 1909 he scaled this claim and found 2486 stumps, which he estimated furnished 1,600,-280 feet of timber.

The sole testimony of the Government to establish this conversion was the bald statement of the witness, Milton Hammond (Tr. 143) that he scaled the timber on this quarter section in the year 1887 (he thinks); that Jack

Cunningham, the logger (not Elijah F. Cunningham, the entryman), cut off the logs. Jack Cunningham testified (Tr. 268) that he cut southeast on the side hill across from the Edgar claim in 1887-8; that he is not familiar with the lines and has no idea how much was cut off; that he just took the timber that came handy; doesn't think they went near the line at all (Tr. 276-7).

It is to be observed that Jack Cunningham denied that the section had been entirely cut over and yet the Government's estimate of what was taken is based on the theory that the defendant was responsible for the timber taken from all the stumps found on the ground in 1909. Clearly as to this quarter section the Government's proof failed in the essential as to the amount of the conversion. As a matter of fact, Jack Cunningham was mistaken, and Milton Hammond something worse.

The fact is that the Cunningham claim was cut in part in the winter of 1891 by E. R. Kilburn and the balance of it in 1892 by William Boyd.

Henry Martin (Tr. 505-6);
E. R. Kilburn (Tr. 510);
William Boyd (Tr. 527);
John C. Hammond (Tr. 531-2);
Frank Foster (Tr. 413);
Chancy Woodworth (Tr. 494).

Tuchenhagen Claim:

This claim comprised Lots 7, 8, 11 and 12 in Sec. 18-14-15, and was a pre-emption cash entry made by William Tuchenhagen July 12, 1890 (Tr. 744). Thus, as in the case of the Cunningham claim, the Acts of March

3, 1891, afford a defense if any conversion was proved. However, no conversion was proved.

Dan Graham testified (Tr. 70-71) that in 1909 he found 2026 stumps, from which he estimated 1,124,870 feet had been taken.

Government witness, John Graham, testified (Tr. 160) that in 1886 timber was cut on Sections 17 and 18 in Township 14 N. R. 15 W.; that he was there all winter under John Cunningham driving horses and felling logs. John Cunningham testified (Tr. 267) as to being in charge of this camp, as testified to by John Graham; he knew where said Section 18 was located and that they had cut all around the lines of it, but he didn't think they cut over the lines.

It is to be observed that Government witness, Cunningham, contradicts Government witness, John Graham, on the proposition that any timber was cut at that time off said Section 18 and witness, John Graham, does not attempt to designate from what portion of said section the timber was taken. We submit the Government failed to prove a conversion against any one so far as this claim is concerned.

An effort was made to show by Dan Graham, as an expert, that the stumps on the Tuchenhagen claim indicated that they had been cut earlier by some five or six years than the cutting on Lots 9 and 10 in this section, constituting land related to the timber permit, which latter was cut in 1892-3 (Tr. 72-3). Objections and exceptions were taken to this line of testimony and will be considered hereafter.

Opposed to the Government testimony was that of Tuchenhagen, the settler, who testified (Tr. 519) that when he settled thereon in 1890 no timber had been cut on his claim, or on any part of the section for that matter; Tuchenhagen sold the claim to W. H. Hammond. He testified (Tr. 449) that he examined it at the time of the purchase and found no timber had been cut thereon except for house and fences and that the claim was cut in the winter of 1892-3.

Longley Claim:

This comprises the south half of the N. W. quarter; east half of the S. W. quarter of Sec. 28-14-16. Only the 80 acres in the N. W. quarter are involved in this action. This was a preemption cash entry made April 26, 1890 (Tr. 744), so here, again, the Acts of March 3, 1891, apply. Also, as a matter of fact, no conversion was proved as will appear under the title of the Merrick Claim, which is next considered.

Merrick Claim:

This claim appears (Tr. 744—middle of page) to have been initiated subsequent to March 3, 1891. It is only as to so much of said claim, namely 40 acres, that is embraced in the N. W. ¼ of Sec. 28-14-16, that is involved in this action. This N. W. ¼ of said Sec. 28 is, as to the south 80 acres thereof, embraced in the Longley claim, which was initiated prior to March 3. 1891, and the north 80 acres thereof comprises, as to the N. E. ¼ thereof part of the said Merrick Claim and as to the N. W. ¼ thereof part of the Rowe claim, which was initiated subsequent to March 3, 1891.

There can be no question but that there was not a scintilla of evidence to establish a conversion by any one on the N. W. ¼ of said Sec. 28, and that had defendant asked for an instructed verdict as to this particular ¼ section it must have been granted or the failure of the trial Court to do so would have constituted as to said ¼ section reversible error readily demonstrable. For present purposes, however, we do not feel that we need weary the Court with a recital of the testimony. It is enough to say that the Government witness, *John* Graham (Tr. 161) endeavored to establish a cutting with which he had been connected as driver of a team in the general vicinity of the so-called Longley Flats (which extended down the Blackfoot River from the N. W. ¼ of said section and took in nearly all of Sec. 29 in the same township (Tr. 501) in the year 1887 or 1888. The Government witness, McNamara, testified (Tr. 279-80) that he knew where the camp was located in reference to the cutting referred to by Graham and that the cutting was done on said Sec. 29 and possibly also on Sec. 21 in the same township; that he knew of no cutting on the Longley Flats.

Furthermore the only testimony as to the amount of timber taken *in this vicinity* was that of *Dan* Graham (Tr. 71) who testified that he scaled upon said Sec. 28-14-16 north of the Blackfoot River; that he found 972 stumps, estimated at 566,080 feet and that he did not know how many acres were there that he scaled. This scaling was done for plaintiff in 1909 (Tr. 69).

It will be observed there is no distribution over the four 40's of the amount scaled by Graham and it will

not be controverted by our opponent but that the territory scaled "north of the river" extended south of the east and west center line of said Sec. 28 into territory which is not involved in the action. Indeed it was admitted that the jury might disregard all testimony as to south of said center line, but as there was no distribution of Graham's estimate and nothing to show how much of his estimate applied outside of the N. W. ¼ of said section, this simply meant that on the question alone as to the amount of timber alleged to have been taken from the N. W. ¼ of said Sec. 28 there was no evidence to take the case to the jury.

In connection with said N. W. ¼ of said Sec. 28 Longley, the settler, testified that no timber had been cut on his claim when he settled on the land April 26, 1890, or when Merrick, who was his brother-in-law, settled on his, Merrick's claim, March 28, 1891, except that some little had been cut from the latter for buildings; that he cut some of the timber in 1891 on his (Longley's) claim, assisted by William Tuchenhagen (Tr. 517), which the latter corroborates (Tr. 520). Witness Pat Hayes (Tr. 500-1) testified to the same effect and so did John C. Hammond (Tr. 531, 535); so did the witness, Kilburn (Tr. 510). The witness, W. H. Hammond, testifies (Tr. 442-3) that he did no logging upon any portion of the N. W. ¼ of said Sec. 28, either while he was operating the Bonner mill for himself or under the lease or while as president and manager of Big Blackfoot Milling Company. He testifies to buying the logs which Longley had cut

on his claim, but these were the only logs that ever at any time went to the mill at Bonner from said Sec. 28.

The timber on the Rowe claim was never cut except at a small point where it almost touches on the Blackfoot River.

It will thus be seen that not only was no conversion proved as to said N. W. ¼ of said Sec. 28, but that if the vague testimony of the witness, *John* Graham, has any significance whatever it determines 1887 or 1888 as the time when the cutting was done. If, on the other hand, the defendant's witnesses are to be believed then the limited cutting done by Longley on his own claim was done in 1891 and long after the Government had lost any right to the timber growing thereon.

We therefore contend that for any and all purposes the N. W. ¼ of Sec. 28-14-16 must be ignored.

Kelly Claim:

This claim was briefly referred to supra, page 86. Title was initiated by John Kelly on August 24, 1894 (Tr. 744), when he entered it as a Timber and Stone entry. The Government produced one witness, James M. Boles (Tr. 281-4) who "thought" this claim was cut off in the year 1891 (Tr. 281); he was "pretty sure" the timber was cut off in 1891 (Tr. 283). Finally, he "wanted to be understood as testifying" that all the timber was cut off the Kelly claim in 1891 (Tr. 285). The Government estimate was that 1,707,420 feet had been cut from this claim.

Opposed to this was the testimony of the witness, Malloch, who scaled the claim while it was being cut *in 1896* (Tr. 521); that of W. H. Hammond, who bought it from Kelly *in 1896* and who at the time of buying it went over it and estimated it and found that no timber had then been cut thereon (Tr. 448-9); finally Woodworth, who had charge of the Northern Pacific Railroad timber, was familiar with this claim by reason of his caring for and running lines on adjoining railroad sections and he testified it was not cut in 1891 (Tr. 495).

It may well be questioned whether there was sufficient evidence to sustain a recovery on the theory of a conversion in 1891. If we accept the showing made by defendant that the claim was cut in 1896, of course, there was no conversion at all as the Government had then lost title to the timber. If, however, we are compelled to assume that the jury found the claim to have been cut in 1891, then we would point out that it does not appear that the claim was cut in 1891 subsequent to March 3 and that, therefore, the Act of March 3, 1891, applies.

Boyd Trespass:

The E. ½ of the N. E. ¼ Sec. 22-14-14 ceased to be Government property when it was taken up as a Timber and Stone entry in 1908 (Tr. 744). The so-called Boyd Trespass extended part way into this 80 acre tract. The original theory of the Government was that the timber on this 80 acre tract was cut at the same time as the timber was cut off the Sontag

and two Silvey claims in this section, which alleged trespasses the Government abandoned on the trial (supra p. 7, par. 1). The time when this alleged trespass occurred was in 1887 and 1888, but defendant was able to prove and did prove by depositions taken in Montana that the Sontag and Silvey claims had not been cut until a much later date, long after the Government had parted with title thereto—and therefore, the Government abandoned its case in respect to these claims. Whether or not it abandoned its theory as to the Boyd Trespass which attributed it to that much earlier date and accepted the explanation of this trespass as offered by Boyd himself who was called as a witness on defendant's behalf, we do not know. This explanation was to the effect that Boyd was cutting the Silvey claims in 1892 and 3 and in doing so he unintentionally cut over the lines and encroached upon this 80 acres (Tr. 526-7); that he never discovered this until August, 1912, after this suit was commenced, when he went over this ground in company with W. H. Hammond and others (Tr. 529). At Tr. 722 it was admitted by defendant that this man Boyd had a contract with the Big Blackfoot Milling Company for the cutting of logs on the Silvey claim adjoining the 80 acres under consideration, but that his contract did not extend to this 80 acres, or any part thereof. In this connection W. H. Hammond testified (Tr. 447-8) that this trespass by Boyd was done in 1892-1893 during the time when he, W. H. Hammond, was manager of Big Blackfoot Milling Company; he did not know how Boyd came to cut it; he gave him no directions to cut

it; that the cutting on this 80 acre tract never had his consent or approval and that the first he knew of it was when he was up over the land after this suit had been brought.

After this suit was brought *Dan* Graham, on behalf of the Government, scaled this 80 acre tract and found 528 stumps, which he estimated represented 356,690 feet (Tr. 71).

As to this 356,690 feet, for which it may be conceded Big Blackfoot Milling Company is responsible as for an innocent conversion, which certainly was likewise the character of Boyd's trespass, it is clear no protection is afforded any one by the Act of March 3, 1891.

Kilburn and Cobban Claims:

These claims are embraced within the S. ½ of Sec. 20-14-15 and were initiated respectively October 29, 1892, and August 31, 1891 (Tr. 744). In 1909 William Greene was employed by the Government (Tr. 77) to make estimates of the amount of timber that had been cut on certain lands and found that on the S. ½ of said Sec. 20 there were 1801 stumps indicating a taking of 469,750 feet (Tr. 78).

In this case there was a total lack of evidence to warrant the finding of a conversion against anyone. The sole testimony of the Government was that of the witness, Milton Hammond, which was to the effect (Tr. 143) that he "thought" he scaled on timber taken off said Sec. 20. His recollection was that it was Gilbert who cut off this section; that he does not remember the exact time, but that it must have been somewhere in

the 90's. Government witness, Cunningham, testified (Tr. 268) that he did not cut anything off said Sec. 20.

Opposed to this hazy conjecture (and be it noted the testimony of the witness, Milton Hammond, does not attribute this cutting to the S. ½ of said Sec. 20, which is the only portion of the section with which we are concerned) is the testimony of Kilburn (Tr. 511), who was the entryman on one of the two claims embraced in the S. ½ of said Sec. 20, to the effect that when he took up the claim none of the timber had been cut therefrom. He sold the claim to McKinnon & McLaren and at that time no timber had been cut from the claim. William Boyd purchased it (Tr. 527) from McKinnon & McLaren in 1898 and cut some 250,000 to 300,000 feet therefrom, which he later sold to W. H. Hammond, who was managing the Big Blackfoot Milling Company for a while after its sale to Daly and he later sold the claim to one Vogel for $1000 (Tr. 528).

W. H. Hammond testified (Tr. 443-4) that he did not, either individually or in connection with any of the corporations referred to, nor did said corporations, cut over any part of said Sec. 20; that William Boyd cut a part of the Kilburn claim near the Blackfoot River at about the time of the sale to Big Blackfoot Milling Company in 1897-1898 and that he, W. H. Hammond, never did any logging on the Cobban claim at any time (Tr. 444).

We submit that as to the S. ½ of said Sec. 20 embracing these two claims the Government failed to make a case. In the first place, Milton Hammond's vague con-

jecture that somewhere in the 90's cutting was done on Sec. 20 is not sufficient to establish a trespass *on the S. ½ of Sec. 20.* Further, if we are wrong in this, a perfect affirmative defense was made by defendant as to the Kilburn claim, and as the plaintiff's estimate of the amount cut off the S. ½ of Sec. 20 is not distributed as between the two claims, a perfect defense as to one, necessarily leaves no evidence from which the amount of timber taken from the other can be computed.

Boileau Claim:

The complaint charged the cutting of timber on 80 acres embracing the N. ½ of the N. E. ¼, Sec. 26-14-16, which was part of the Timber and Stone entry made by John P. Boileau October 22, 1894 (Tr. 744). In 1909 William Greene, employed by the Government for the purpose, estimated that on this 80 acres there had been cut 199,960 feet from 414 stumps. The Government's evidence apparently was directed to establish this conversion around 1888; but there was a total lack of evidence of any conversion. Government witness, Cunningham, testified (Tr. 269) that he "contracted" that year to cut timber from Secs. 23 and 25, which he did (Tr. 272) and built his camps on Sec. 26 and bridges with timber cut from said Sec. 26. He was working in partnership with McNamara and W. H. Hammond "called him down" for cutting this camp and bridge timber off Sec. 26. It was no part of his contract with W. H. Hammond for W. H. Hammond to furnish the camp and bridges, and these logs for that purpose were cut for Cunningham's own benefit and upon his own

responsibility (Tr. 271). All of this is confirmed by Government witness, McNamara (Tr. 279-80). Pat Hayes testified (Tr. 501-2) that no logging had been done on this claim until 1895 when it was cut by Dunnigan, though a few trees had been cut for ties or something of that kind. W. H. Hammond's testimony (Tr. 443) is to the same effect. Some of this trifling early cutting on this claim is also accounted for by the operations of a man named Sloan, who cut ties and piling handy to the Blackfoot River in 1882 (Tr. 483), with which, of course, defendant has no connection whatsoever.

Rowe Claim (Tr. 745):

This has already been considered under the title of "Merrick Claim".

The Timber Permit:

The complaint charged the cutting of timber from the south half of Sec. 18-14-15. This section was a short section from east to west comprising only three lots. The south half is composed of Lots 7, 8, 9, 10, 11 and 12. Lots No. 8, 11 and 12 comprise the Tuchenhagen Claim, which we have already considered in this topic. For want of a better general term the Tuchenhagen claim may be described as being the S. E. ¼ of said section. Lots 9 and 10 would comprise the southwest ¼, Lot 9 the north half and Lot 10 the south half of said southwest ¼. Big Blackfoot Milling Company applied (Tr. 453, fourth line from top) to the Secretary of the Interior for leave to cut off all of Section 18, except the

southwest quarter. In other words the company applied for leave to cut off the north half *and* the S. W. ¼ of said section (as we have seen the S. E. ¼ was already taken up by Tuchenhagen). The permit, as granted, read the N. half *of the* S. W. ¼ of said section (Tr. 463, middle of page). As will be seen (Tr. 464) this small item is found in a description which embraces the permission to cut timber from 11,280 acres "as more specifically described in its (Big Blackfoot Milling Company) application".

We have no doubt the Government intended to grant the right to cut from the N. half *and the* S. W. quarter of said section (Lots 9 and 10 containing respectively 45 acres) and not merely Lot 9, the so-called north half of the S. W. ¼. The customary abbreviation (an instance of it will be found in the description in the complaint in the case at bar) is as follows: N. ½, S. W. ¼, Sec. 18. This does not mean the N. half *of the* S. W. ¼ of said section, but it does mean the N. ½ of Sec. 18 *and the* S. W. ¼ of Sec. 18. In checking over a description it is easy to understand how such a mistake could be made, particularly where the mind of the person engaged in the work would be expecting and finding a correspondence throughout between the application and the permit.

Dan Graham in 1909 found 294 stumps on Lot 9, which is covered by the permit, from which he estimated 161,340 feet had been cut, and on Lot 10, mistakenly supposed to have been covered by the permit 408 stumps, representing 193,390 feet (Tr. 70-1).

Plaintiff's testimony leaves us in doubt as to whether or not it was intended to establish a cutting on these two lots at the same time as they claimed (ineffectively) the Tuchenhagen claim had been cut (see Tuchenhagen claim in this Topic, supra). If so, as will appear from our discussion as to the Tuchenhagen claim plaintiff failed to establish a conversion.

On behalf of defendant, W. H. Hammond testified that the cutting on these Lots 9 and 10 in Sec. 18-14-15 was done by Big Blackfoot Milling Company on or about the same time as the Tuchenhagen claim was cut in the winter of 1892-3; that at the time it was done he did not know that cutting was being done on Lot 9 and that he first learned of it after the commencement of this action when he went over the land and, on doing so, he noted considerable timber had been left standing on both these lots 9 and 10, in accordance with the requirement of leaving 50% of the timber standing where cutting was done under a timber permit—this, in contradistinction to the Tuchenhagen claim, which had been cut clean (Tr. 469-70).

The testimony of the Government witness, Dan Graham, is to the same effect (Tr. 72).

It is obvious that these two lots of 45 acres each do not come within the protection of the Acts of March 3, 1891, as they were cut subsequent to the enactment of said Acts. Lot 10, representing 193,390 feet is frankly an innocent trespass; Lot 9, representing 161,340 feet, the Government claimed was not protected by the timber permit even though covered by it inasmuch as defendant failed to show compliance by Big Blackfoot Milling

Company with the terms of the permit (Instruction Tr. 766-7). Defendant contended that it was for the Government to show that the cutting actually done was not in accord with the terms of the permit (Exception to Instructions Tr. 779; A. of E. No. 6, p. 20, supra).

Edgar Claim:

The title to this land is now in the State of Montana, it having been selected by the State under an Act of Congress, by which Montana became entitled to certain lands within its boundaries (Tr. 479). This, of course, was subsequent to the cancellation of the entry of Henry F. Edgar. His claim constituted the S. E. ¼ Sec. 28-14-14. It was stipulated between the parties that Henry F. Edgar filed his Preemption Declaratory Statement Nov. 23, 1885, and date of settlement was Oct. 26, 1885. The Government endeavored to establish, with but scant success that timber was cut from the Edgar claim in 1887, while W. H. Hammond admitted that Edgar and he had cut timber from same in 1885 and in 1886,—but not later. As the claim lapsed and was cancelled, we do not suppose it much matters whether the cutting was in 1887 or earlier, though if at the later date it might be argued that W. H. Hammond was guilty of a wilfull and not an innocent trespass in relation to the cutting, as at the later date the difficulties connected with Edgar's citizenship papers had manifested themselves and the issuance of final receipt was delayed.

Now, the facts concerning Henry F. Edgar and his entry are these: In passing it may be noted that he

bears to Montana the same relation as does Marshall to California in that he was the discoverer of the one time extensive gold placer claims in that state. A fresco of him is prominent at one of the four corners from which the dome of the Montana Capitol Building at Helena arises. He died after this suit was commenced from a cold contracted while visiting Missoula to explain to defendant's representatives the history of his troubles with the claim and unfortunately, so far as this case is concerned, before his deposition could be taken.

W. H. Hammond testified (Tr. 444-5) that the first cutting was done in the winter of 1885-6 and completed in the summer of 1886 and that this cutting was done while he was operating the Blackfoot Mill on his own account. In the winter of 1885-6 Edgar logged the claim himself and W. H. Hammond bought the logs on the bank of the river and in the summer of 1886 the logging was done by W. H. Hammond directly. W. H. Hammond did not recollect how much was paid for the logs he bought on the bank of the river, but he paid $1.00 a thousand for the stumpage he cut in the summer of 1886.

On May 13, 1886 (Tr. 446) the U. S. Land Office at Helena, Montana, wrote to Woody & Marshall, Edgar's attorneys at Missoula, Montana, returning to them Edgar's final preemption proof, also sent a check for $400.00 which had theretofore accompanied Edgar's final proof papers when he sent same to the Helena Land Office. The proofs were returned as they did not show Edgar to be a naturalized citizen. W. H. Hammond had known of Edgar going with his witnesses to prove up upon his claim and it was not until the late fall of

1886, after the timber had been cut from the claim, that he learned there was some question about Edgar getting title to the property (Tr. 447).

Edgar's step-son, Frank Foster, testified (Tr. 415-16) to the difficulty Edgar experienced in the matter of his citizenship papers, he having lost the original and the record had been destroyed in a fire at Fergus Falls, Minnesota; also he testified concerning the making by Edgar of his final proof, as did the witness Kilburn, who was one of Edgar's final proof witnesses (Tr. 515).

Notwithstanding the foregoing, Edgar's homestead entry was finally cancelled by reason of the conclusion of the Acting Commissioner of the General Land Office at a hearing to which Edgar was cited to appear, but did not do so, to the effect that the entry was not made in good faith—which conclusion was based upon the report of a special agent (Tr. 723).

There was abundant evidence, some of it from the Government's own witnesses, that considerable cultivation was done by Edgar and his family upon this claim upon which he lived until at least 1889 and that he intended to make of this claim and that it was susceptible of being made into a home for himself and family. In this connection we shall merely refer to the pages in the transcript wherein this evidence is set forth:

Frank Foster, Tr. 409-12;
E. R. Kilburn, Tr. 509;
J. B. Seeley, Tr. 192, 194;
W. H. Hammond, Tr. 479-81.

The claim now made by the Government for the cutting of timber from the Edgar claim furnishes a striking illustration of the hardship and abuse that may arise from the fact that the Government is immune from the plea of the statute of limitations. Whatever the irregularities may have been the Government had almost contemporaneous notice of them.

George H. Reeder, a civil engineer, called as a witness on behalf of plaintiff testified (Tr. 134) that he was employed by M. J. Haley, a special agent of the General Land Office, to run out the lines of Sec. 28, of which section the Edgar claim constituted the S. W. ¼, for the purpose of investigating the extent of the timber trespass. This was in August, 1886.

Chas. W. Helmick, a civil engineer, called as a witness on behalf of plaintiff, testified (Tr. 133) that in October, 1888, he went over the Edgar claim in company with M. J. Haley and found 1635 stumps.

M. J. Haley, who for eight years was a special agent of the General Land Office, testified (Tr. 164) to his accompanying Reeder and Helmick on the Edgar claim on two several occasions. Haley did not have his notes made at the time as did Reeder and Helmick. Haley understood in 1893 that these cases had been dismissed and probably he or his wife destroyed his notes in consequence. In fact, in 1893 Mr. Ogden, who had charge of fraudulent timber cutting in Montana (Tr. 108-9) discussed with Haley some of these cases, including the Edgar claim and they prepared a statement and signed

it, which recommended the dismissal of the cases on the ground that years had elapsed and it was doubtful about the result of the cases—something of that sort. Later he heard the cases had been dismissed.

If, as we shall hereafter consider, the question of the allowance of interest is affected by the existence of a long and unexplained delay upon the part of a plaintiff in asserting its rights we would beg of the Court to recall specifically this Edgar claim—1886 to 1910—26 years—with knowledge on the part of the plaintiff in 1886.

In 1909 William Greene (Tr. 78) estimated the Edgar claim on behalf of the Government and found 2620 stumps, which he concluded represented 1,557,025 feet. As we have seen, Helmick found only 1635 stumps in 1888 and the Government does not claim that any timber was cut after the time last mentioned. This furnishes a nice commentary on the accuracy of stump counting and estimating therefrom a quarter of a century after the timber has been cut. The process of guess work involved in this *ex post facto* stumpage estimating will be found described in the cross-examination of Dan Graham (Tr. 74-77).

W. H. Hammond testified (Tr. 479) that he did not remember how much timber was cut from the claim—he guessed there was almost a million feet that he and Edgar cut off together.

Anyhow, the cutting occurring prior to 1891 is condoned by the Acts of March 3, 1891.

TOPIC III.

THE COURT ERRED IN FAILING TO GIVE CERTAIN INSTRUCTIONS PROPOSED BY DEFENDANT BEARING UPON THE LIABILITY OF DEFENDANT FOR THE TIMBER CUT, AND PARTICULARLY AS TO TIMBER CUT FROM THE EDGAR CLAIM, AND UNDER THE "TIMBER PERMIT"; ALSO AS TO HIS LIABILITY IN CONNECTION WITH THE SO-CALLED "BOYD TRESPASS".

The charge of the Court in so far as it related to the liability of defendant for the alleged conversions will be found in the Transcript, page 754 (bottom) to page 760 (middle) and while, from its length, it might be thought that the jury was adequately instructed in the premises, nevertheless, we submit that such was not the case. An examination of the charge of the Court on this subject will disclose that the Court attempted to define defendant's responsibility in the premises in the abstract rather than in the concrete as applied to the facts in the case. Anything so elusive and perplexing as are the several elements which may furnish evidence tending to establish the responsibility of one person for the act of another ought, we submit, where possible, to be expressed to the jury in reference to the facts in the case and not in terms of generalities or abstractions. Nevertheless, the Court refused to give the instructions offered by defendant on this subject; A. of E. No. 15, p. 28, supra; A. of E. No. 16, p. 29, supra; A. of E. No. 22, p. 33, supra, and A. of E. No. 23, p. 33, supra.

Particularly objectionable was the refusal of the Court to give defendant's requested instruction con-

cerning defendant's responsibility in connection with the so-called "Boyd Trespass", a situation which illustrated the proposition that the liability of defendant for that trespass was by no means based upon the same considerations as would determine the responsibility of Big Blackfoot Milling Company therefor—A. of E. No. 19, p. 31, supra. The same thought is true as to the Edgar claim—A. of E. No. 20, p. 32, supra, and as to the timber cut under the supposed protection of the timber permit—A. of E. No. 21, p. 32, supra.

That the jury was not sufficiently instructed as to the principles that should apply in determining whether or not the defendant was liable for the alleged conversions is evidenced by the action of the jury. After the jury had been deliberating all afternoon and evening, on the following morning it came into Court (Tr. 781) and the foreman stated that the jury would like to have reread to it certain testimony and the instructions of the Court regarding the liability of the members or officers of a corporation. As a matter of fact the desire of the jury for instructions on the law in this particular was never gratified, for they received such scant sympathy from the Court in the matter of the rereading of the testimony that they did not venture to press the Court for the instructions (Tr. 782-785).

TOPIC IV.

THE COURT'S INSTRUCTION CONCERNING THE MEASURE OF DAMAGES APPLICABLE AS FOR AN INNOCENT CONVERSION WAS ERRONEOUS, AS WAS ALSO ITS INSTRUCTION TO THE JURY TO ALLOW INTEREST AND IN PERMITTING THE PRAYER OF THE COMPLAINT TO BE AMENDED TO INCLUDE A DEMAND FOR INTEREST. HEREIN IS ALSO CONSIDERED THE SUFFICIENCY OF THE OBJECTIONS OF DEFENDANT INTERPOSED TO THE CHARGE OF THE COURT IN THESE PARTICULARS.

As to the measure of damages and the awarding of interest the Court instructed the jury (Tr. 769-70, 776) as follows:

> "(a) It is alleged in the complaint that the value of the timber from which the lumber sued for was cut, while standing on plaintiff's land, was one dollar per thousand feet, board measure; that its value when felled and ready for sawing was five dollars per thousand feet; and that when manufactured into lumber its value was ten dollars per thousand feet, like measure; and it is alleged that the value of the whole quantity of lumber taken and appropriated by defendant was the total sum of $211,854.10. But should you find that plaintiff is entitled to recover, you will fix the value of the lumber taken from the evidence according to the rule or measure of damages hereinafter stated to you, and determine the amount of your verdict therefrom. The value alleged is merely the plaintiff's estimate, and that is always subject to control by the evidence in the case.
>
> If, under the principles I have stated, you find that the defendant, or any of the corporations named acting under his direction and control, knowingly and wilfully cut and converted the timber mentioned in the complaint, or any part thereof, then the plaintiff is entitled to recover the market value of the timber so converted in whatever condition or form it may have been at the time of its disposal or sale.
>
> (b) If you find that the defendant, or any of the said corporations while acting under his direction and

control, converted the timber mentioned in the complaint, or any part thereof, under the honest but mistaken belief that he or they had the right under the law to cut and remove such timber, then in assessing the damages you will fix the value of the same at the time of conversion less the amount which was added to its value before sale; in other words, if you find that timber was so cut and removed from lands of complainant and that there was added thereto certain value by reason of the manufacturing of said timber into lumber for the market, then the measure of damages will be the difference between the expenses incurred in the manufacturing of said lumber and the price for which it was sold in the market.

(c) In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time. * * * The rate of interest is the legal rate of seven per cent."

The first two paragraphs of this instruction, designated by us by the letter (a), constitute the Court's direction as to the principles applicable to the theory of defendant's responsibility as a willful trespasser; the third paragraph, for convenience designated (b) the rule of law applicable to the theory of an innocent trespass, and the last paragraph, for convenience designated (c) the direction by the Court to the jury to award interest.

That portion of the instruction (a) treating of the conversion as a willful one is assigned as error (A. of E. No. 8; pp. 23-24, supra) and we shall not here extend the discussion of the grounds of error which are specified in said assignment, as the vice in that portion of the instruction, namely, that defendant would necessarily be liable as for a willful conversion, if any of the third

parties for whose acts it is claimed he is responsible were so liable, has already been considered under Topic III herein, in connection with the failure of the Court to instruct the jury specifically in reference to the concrete facts and as to what they must find in order to hold the defendant liable for the acts of others.

We shall, therefore, pass to a discission of that portion of the instruction (b) and so far as interest may be considered as an element of damages, that portion, (c) defining

1. The measure of damages as for an innocent conversion.

The instruction defining the measure of damages as for an innocent conversion is assigned as error (A. of E. No. 9, p. 25, supra) and the grounds of such error are there specified.

We contend that as an abstract proposition of law this instruction was erroneous, as we insist that the law is well settled that the true measure of damages under such circumstances is the stumpage value of the standing timber and not the price for which the lumber manufactured therefrom is sold in the market, less the expenses incurred in the manufacture of such lumber.

At the threshold of this inquiry we are confronted by the question as to what law, statutory or otherwise, should furnish the measure of damages in this case. It is mainly in reference to the question of the allowance of interest that this consideration becomes of importance, for it will be seen there is virtually a unanimity, among the Courts, Federal and State, as to what, out-

side of the question of interest, is the proper measure of damages in cases of an innocent conversion.

Here we have a conversion committed in Montana from and including the year 1885 to and including the year 1894. We contend that

(A) The law of Montana existing during the period of the conversion should furnish the measure of the defendant's responsibility,

not the law existing in Montana at a later date, or that prevailing in California at any time. In the recent case of

Western Union Tel. Co. v. Brown, 234 U. S. 542; 58 L. Ed. 1457,

it was held that the legal responsibility for negligent failure to deliver a telegram must be determined by the law in force where the act of negligence was committed and not by that of the forum. In delivering the unanimous opinion of the Court Mr. Justice Holmes said:

> "Whatever variations of opinion and practice there may have been, it is established as the law of this Court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere and that is not only the ground but the measure of the maximum recovery (citing cases). The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious."

Said the same learned Justice, speaking for the Court in the case of

Cuba R. Co. v. Crosby, 222 U. S. 473, 478, 480; 56 L. Ed. 274-6:

"But when an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the Court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law. Slater v. Mexican Nat. R. Co., 194 U. S. 120, 126. The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liability of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. American Banana Co. v. United Fruit Co., 213 U. S. 347, 356. See Bean v. Morris, 221 U. S. 485-487. That, and that alone, is the foundation of their rights."

See also:

Northern Pacific Railway Co. v. Babcock, 154 U. S. 190; 38 L. Ed. 958;

Northern Pacific Railroad Co. v. Mase, 63 F. 114; 11 C. C. A. 63;

Erickson v. Pacific Coast Steamship Co., 96 F. 80.

Wharton, Conflict of Laws, Sec. 478 C., Vol. 2.

(B) The only possible alternative to the applicability of the Montana rule as it existed during the period of the conversion, is the rule worked out by the Federal courts for the conversion of timber growing upon the public domain in cases in which the government is a party.

As we have seen, it is settled law in the Federal Courts that in suits between private individuals for torts, the *lex loci* and not the *lex fori* will control, where the matter is regulated by statute at the *lex loci.* If the matter be not regulated by statute at the *lex loci,* but is dependent upon general principles of the common law,

then the Federal Courts will not necessarily follow the decisions of the particular state, but will for themselves seek out the true rule.

Northern Pacific R. R. Co. v. Mase, 63 F. 114; 11 C. C. A. 63.

So it was held by our own Circuit Court of Appeals that in an action for alienating the affections of plaintiff's wife punitive damages would be permitted in the Federal Court in the State of Washington, although the State Court in the absence of any statute on the subject had repudiated the doctrine of punitive damages. The Federal Court felt bound to permit punitive damages as in the absence of a statute on the subject in the State of Washington, the Federal Court, sitting in that State, would follow its own conception of the "principles of general jurisprudence".

Woldson v. Larson, 164 F. 548; 90 C. C. A. 422.

We shall hereafter show that a statutory measure of damages existed in Montana (at least so far as concerns the element of interest) throughout the period of the conversion and also thereafter from 1895, when the State of Montana took over bodily the California Codes, until the present time, and there can be no doubt but that as between private individuals the Montana statute existing during the period of the conversion would control. We think it controls in the case at bar to the extent that the subject is covered by statute, namely, as to the allowance of interest: In other respects there seems to be no reason why the rule worked out by the Federal Courts as applicable to the unlawful, but innocent conversion of timber from the

public domain wherein the Government is the party plaintiff, should not control, and there are many cogent reasons why such law should apply. The damages which accrue to the Federal Government when its timber is taken are not always to be measured by the same standard that prevails between private individuals. The Government does not hold its timber lands for mere profit, and value to the Government is not to be measured by a standard of mere dollars and cents. Larger questions of public policy, on the one hand conservation for the protection of water sheds, conservation for the benefit of present and future generations, and the like—are involved. On the other hand considerations making for the welfare of the community, such as the development of the community resulting from the cutting and use of timber, which are immaterial factors as between private individuals, may legitimately find a place in the molding of the Government's policy. It hardly seems proper, for instance, that a trespass upon a Government reserve in one state should give rise to penalties different from those which would prevail in another, or that the Government in this particular should be at the mercy of state legislators, whose statutory measure of damages might be as various as the states themselves, and as different as the views of the several communities on questions of conservation. An interesting question, therefore, arises, viz.: Is the Government to be bound by the statutes of the several states fixing the measure of damages in cases of conversion, or will it carve out and has it carved out for itself a measure of damages applicable in cases of this character?

That there are many statutory rules laid down by states, which will not be binding upon the United States, is notorious. Thus a state statute of limitations will not bind the Federal Government. If it did, the United States could not maintain the action at bar, for it would be barred by the statute of limitations of Montana.

U. S. v. Thompson, 98 U. S. 488.

The United States cannot be sued without their consent.

U. S. v. Clark, 8 Peters 436.

If the Government itself sues, no judgment can be rendered against it, either on a counter-claim or for costs.

United States v. Boyd, 5 Howard 29.

A judgment in favor of the United States cannot be enjoined.

Hill v. U. S., 9 Howard 386.

Many other instances might be enumerated. In the case first above cited, United States v. Thompson, supra, it is said:

> "There are thirty-eight states in the Union. The limitations in like cases may be different in each State and they may be changed at pleasure from time to time. The Government of the Union would, in this respect, be at the mercy of the States. How that mercy would, in many cases, be exercised, it is not difficult to foresee."

So, too, in certain states where the timber conservation policy of the Government is not popular, it is entirely possible to foresee analogous difficulties were

the state legislators permitted to lay down a measure of damages binding upon the Government.

So much for the general principle. Apart from it, it seems clear that, in any event, a state statute will not affect the United States in maintaining its actions, unless it declares in terms that it includes the United States Government.

United States v. Bean, 120 Fed. 719, was an action brought in Montana by the United States Government against the executrix of Marcus Daly for the conversion of timber by Daly in his life time. It was contended that no suit could be maintained because the Montana statute required that there first be presented a claim against the estate, and the complaint failed to allege that the Government had done this.

Knowles, District Judge, said:

> "The question arises as to whether or not the United States can be incumbered in maintaining its actions by any state law. I am inclined to believe that they cannot, unless specially named therein, and the demurrers are, therefore, overruled."

We have thus ventured to express the other side of the question as to whether or not state statutes will control in cases with such a subject matter to which the United States is a party. In any event it will be found that the rule given in the instructions is utterly at variance with the rule formulated by the Federal Courts.

(C) The Montana statute concerning the measure of damages for an innocent conversion as it existed during the period embraced by the conversion.

Aside from the question of interest it was not until 1895, that Montana had a statutory measure of damages applicable to cases of conversion. As respects the allowance of interest the state of the Montana law until 1895 is shown in Palmer v. Murray, 8 Mont. 312; 21 Pac. 126, decided in 1889. The opinion of the Court says (p. 127):

> "The complaint alleges that the defendant wrongfully carried away and converted to his own use certain personal property of the plaintiff, to her damage in the sum of $4500, for which she prays judgment, with interest from the date of conversion. * * * The demand is for damages, with interest thereon, and whether it is a demand in trover or replevin, it still retains the character of a suit sounding in damages, and is most certainly for an unascertained, and therefore unliquidated, demand * * *
>
> "We have no doubt that it was never the intention of the law to allow interest on demands for damages from the date of the act complained of, but only from the date of damage when ascertained by judgment."

In 1880 the case of Randall v. Greenhood, 3 Mont. 512, was decided, in which the demand was for damages for conversion, and, interest being allowed from the date of conversion, "it was stricken out as not permissible under the statute".

Concerning this case and the statute in question, it was said in Murray v. Palmer, supra:

> "This construction of the statute is under the well-known rule of interpretation found in the maxim of *inclusio unius est exclusio alterius.* Having specified the

> cases in which interest shall antedate the judgment, the natural conclusion is that the law-maker intended to exclude or deny the right in instances not so enumerated * * * The matter is purely one of statutory construction; and after the lapse of 16 years we do not think it wise to disturb the practice thereon."

In this case there was a vigorous dissenting opinion, in which McConnell, C. J., argued in favor of the rule, that the value of the property at the time it is converted, with interest thereon to the date of judgment should control. He contended that "the interest is an integral part of the damages, and is so allowed as a part of the indemnity to which the plaintiff is entitled, and is not given as interest *eo nomine,* in the statutory sense of the word". He was, however, overruled by a majority of the Court, and, as we have seen, it was held that the measure of damages was the value at the time of conversion *but without any interest* prior to the date of judgment. Such was the rule prevailing in Montana at the time of the conversions alleged in the complaint in the case at bar. Measured by that rule, the instruction given by the Court was obviously erroneous.

Upon the argument of the motion for a new trial, the Government's counsel took the position that the statutory law of Montana and of California had no bearing on the question under discussion. That the California law is inapplicable we, ourselves, concede, as also do we take the position that the Montana statutory law enacted subsequent to the conversion is a

false quantity. As to the latter question it is surely elementary law that years after the commission of a conversion the measure of damages could not be changed by statute so as to confer a new and additional right upon the plaintiff at the expense of defendant.

Beale's Interpretation of Laws, (2nd ed.) pp. 414 et seq.

It is to be noted, moreover, that a statute allowing or disallowing interest in cases of conversion, establishes an absolute right. It is not a mere matter of the remedy. Thus, in Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 538; 52 L. Ed. 606, the statute of Oklahoma, fixing the measure of damages in cases of conversion,—*a statute identical with that of California, and with that in force in Montana since 1895,*— the United States Supreme Court says:

> "* * * In the absence of statute the general rule is that in actions for tort the allowance of interest is not an *absolute right;* * * * but the Oklahoma statute has made interest a part of the detriment caused by the conversion of personal property. Other states have done the same."
>
> "The elements and measure of damages for a tort, statutory or non-statutory, are generally regarded as matters of substance rather than of remedy."

Wharton, Conflict of Laws, Vol. II (3rd Ed.), Sec. 478c.

See, also,

Western Union Tel. Co. v. Brown, supra, 234 U. S. 542; 58 L. Ed. 1457;

McCormick v. Penn. R. R. Co., 49 N. Y. 315.

Furthermore, the Montana statute adopted in 1895 was expressly declared to be prospective only in its operation.

In view of the position taken by opposing counsel upon the motion for a new trial we shall not burden the body of this brief with a discussion of the California law, or that prevailing in Montana subsequent to the conversion, but in the event the matter should be deemed of interest by the Court it will be found in Appendix I hereto. It is enough to say that except as regards the matter of interest the measure is the same as that applied in the United States Courts and throughout the State Courts generally.

(D) The measure of damages applied in the Federal Courts to cases of innocent conversion of timber growing upon the public domain in which the United States is a party.

The latest case upon the subject, decided by the United States Supreme Court Feb. 23, 1904, is United States v. St. Anthony R. R. Co., 192 U. S. 524; 48 L. Ed. 548. In that case the Court says (p. 541):

> "The further question is as to the time when the value of the timber is to be ascertained.
>
> "The parties agreed that the amount of the timber growing on the lands is correctly stated in the answer, and the value thereof at the place where the timber was cut was $1.50 per thousand feet and the value upon delivery to the defendant was $12.35 per thousand feet. The delivery to the defandant was made by the Thompson Mercantile Company with which the railroad company had entered into a contract to be supplied with the necessary ties and timbers for the construction of its road, and in such contract the mercantile company was, by the ex-

pressed terms thereof, appointed the agent of the defendant, and in that capacity it was authorized by the defendant to cut timber for the purpose mentioned. The mercantile company did cut the timber on the lands, which it in good faith supposed were adjacent to the line of the railroad, and delivered such timber to the railroad company upon the line of its road. *We think the measure of damages should be the value of the timber after it was cut at the place where it was cut.*"

The Court then refers to two previous cases, Wooden-Ware Company v. United States, 106 U. S. 432; 27 L. Ed. 230; and Pine River Logging Company v. United States, 186 U. S. 279; 46 L. Ed. 1164, saying (p. 542):

"In both of those cases the parties doing the cutting did it willfully and in bad faith. * * * In the Pine River Logging case, the parties to the contract were held liable for the full value of the timber after it was cut and had increased in value by reason of the labor expended upon it by the parties who did the cutting. This was on the ground that they were willful trespassers, acting in bad faith, and ought to be made to suffer some punishment for their depredations; but it was stated that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, *the value of the property when first taken must govern.*"

United States v. St. Anthony R. R. Co., 192 U. S. 524; 48 L. Ed. 548.

Referring to the conversions committed by the defendant, St. Anthony Railroad Company, the Court says:

"* * * there was no intention on the part of the defendant to violate any law or to do any wrongful act. This, we think, clearly takes the case out of the principle of those above cited, *and the measure of damages must, therefore, be the value of the timber at the time and at the place where it was cut.*"

The measure of damages thus laid down by the Supreme Court of the United States, in a case concerning the Government's timber, is, we submit, conclusive in the case at bar. That measure is utterly at variance with the rule laid down in the instruction of which we are here complaining.

The rule as announced by the Supreme Court of the United States measures the damages by the value of the timber at the time and place where it was cut. The instruction complained of tells the jury that the measure was the selling price of the lumber, less cost of manufacture. The conversion by the St. Anthony Railroad Co. had taken place in 1899. Judgment was not rendered until five years later. The measure of damages fixed by the Supreme Court of the United States allows no interest. The instruction here complained of tells the jury that they must allow interest.

We now turn to the cases in the Federal Courts, other than the United States Supreme Court, decided prior to this case.

In United States v. Northern Pacific R. R. Co., 67 Fed. 890 (decided May 11, 1895), the judgment was rendered on $9.00 per thousand feet, the value of the manufactured lumber at the market. The defendants petitioned for an order setting aside the judgment, upon the ground that the value of the standing timber, before an increased value had been added, was the true measure of damages. Judge Gilbert granted the motion saying (p. 891):

> "The Supreme Court, in Wooden-Ware Co. v. U. S., 106 U. S. 434, has declared the doctrine that 'where the tres-

> pass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern.' This case comes clearly within the rule thus defined. * * * The testimony shows that the value of the standing timber at the time it was cut was about seventy-five cents a thousand feet. * * *''

The judgment entered in favor of the United States for $2,095 was accordingly set aside, and a judgment for $220 and costs was entered in lieu thereof. It will be noted that no interest was allowed.

In U. S. v. English, 107 Fed. 867, Judge Bellinger, in a case tried without a jury in the Circuit Court, District of Oregon, decided April 4, 1901, applied the value of the wood in the tree at the rate of 50 cents per cord holding the conversion to be an innocent one, it appearing that the cord wood, to recover the value of which the action was brought, was worth on the ground $1.50 per cord and at the mill $3.00. No interest was allowed.

In Gentry v. United States, 101 Fed. 51, 41 C. C. A. 185, decided in 1900, the Circuit Court of Appeals for the Eighth Circuit, holds that the measure of damages is "the value of the timber in its original place, or, in this case, for one dollar per one thousand feet, and for no more".

In United States v. Teller, 106 Fed. 447, 451; 45 C. C. A. 416; decided in 1901 by the United States Circuit Court of Appeals, Eighth Circuit, the instruction considered was as follows:

> "However, if you should find from the evidence that some ties were cut, but that the defendant was an unintentional or mistaken trespasser, then the amount to be deducted would be their value at the time they were so

> cut, less the amount which he or his employees have added thereto by their labor; in other words, the value as they stood in the tree, which the testimony tends to show was about three cents per tie."

The Court said (p. 451):

> "The charge of the Court, being correct in law (*Bolles Wooden-Ware Co. v. United States,* 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; *Golden Reward Min. Co. v. Buxton Min. Co.,* (C. C.) 79 Fed. 868) was warranted by the proof, and no error was thereby committed."

In United States v. Van Winkle, 113 Fed. 903; 51 C. C. A. 533; decided in 1902, the United States Circuit Court of Appeals, for the Ninth Circuit (Gilbert, Ross and Morrow, JJ.) said:

> "If he acted in good faith, the court required the verdict of the jury to be for the value of the timber as cut, and not as manufactured. Gentry v. U. S., 101 Fed. 51; 41 C. C. A. 185."

By the language "the value of the timber as cut" the Court meant the value of the timber in the tree—stumpage—for, as we have seen, such is the ruling in the Gentry case cited by the Court.

In United States v. Homestake Mining Co., 117 Fed. 481, 482; 54 C. C. A. 303, decided in 1902, the Court of Appeals for the Eighth Circuit declared that

> "the limit of the liability for damages of one who takes ore or timber from the land of another without right through inadvertence or mistake, or in the honest belief that he is acting within his legal rights, is the value of the ore in the mine or the value of the timber in the trees", citing numerous authorities.

In Powers v. United States, 119 Fed. 562, 567; 56 C. C. A. 128, decided in 1903, by the Circuit Court of Appeals for the Sixth Circuit, it is said that

> "when the defendant is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of the conversion, less the amount which he or he and his vendor have added to its value, constitutes the measure of damages." (Citing many cases, among them, U. S. v. Van Winkle and Gentry v. U. S., supra.)

The time of conversion here referred to is, under the decisions cited as well as the decisions of the United States Supreme Court,—notably U. S. v. St. Anthony R. R. Co.,—the time when the tree is severed from the freehold. Up to that point the amount which the innocent trespasser has added to its value is the cost of severance. The value at the time of conversion is, therefore, the stumpage value plus the value given to the tree by the cost of severance, less the amount expended for the purpose of accomplishing the severance. In short, it is the stumpage value as indicated in the above decisions.

The case of U. S. v. McKee, 128 Fed. 1002, 1005, was decided by Judge De Haven March 25, 1904, just four weeks after the decision by the Supreme Court of the United States in the case of U. S. v. St. Anthony R. R. Co., supra, and so short a time elapsing between the two decisions it is perhaps fair to assume that Judge De Haven's decision was not influenced by the rule in the St. Anthony case. He said:

> "My conclusion, therefore, is that the evidence is not sufficient to justify the Court in finding that the trespass

> was a willful one, and, as it was not, the Government is only entitled to recover the value of the bark in place upon the tree; that is, its stumpage value."

The evidence in this case well illustrates the circuitous methods that sometimes have to be adopted by the Courts in *determining the value of the timber as it stands in the tree* and accounts for the round-about way in which the rule declaring the measure of damages in cases of innocent conversion has sometimes been expressed, with the evident end in view of determining the value of the timber as it exists in the tree—the stumpage value. Where this is the case the Court has to work backwards from the value of the finished product, eliminating one by one the several elements that contribute to the value of the finished product—the residue constitutes the stumpage value. Thus—in this case—United States v. McKee, supra,—a witness made an estimate of the stumpage value. This the Court adopted, stating that such

> "estimate was evidently based upon the selling price of the bark at the point of shipment, the cost of hauling, cutting and pealing, and the allowance of a reasonable profit for carrying on the business of placing it upon the market. In the absence of direct evidence upon the market price paid for bark upon the standing tree, these were all proper matters for consideration in fixing a reasonable stumpage value".

We invite the attention of the Court to the deliberate and very proper inclusion of the element of profit as an item of value with which the defendant should be credited.

All of the foregoing cases, with the exception of the last, were decided prior to the decision rendered in 1904

in United States v. St. Anthony R. R. Co., 192 U. S. 524; 48 L. Ed. 548. Whether that case intends to allow the value in the tree or the value immediately upon severance is perhaps debatable The only cases decided in the Federal Courts since that time adhere to the rule of stumpage value. Thus in Morgan v. United States, 169 Fed. 242; 94 C. C. A. 518, decided in 1909, the Circuit Court of Appeals for the Eighth Circuit, says (p. 249):

> "If the defendant went upon the land and cut and removed the timber in good faith, believing that he had a right thereto, he was only answerable in damages for the stumpage value thereof, and not for the manufactured value. This is the universally recognized rule of law."

And the Court approved an instruction in so far as it defined the measure of damages for an innocent conversion as constituting "the value of the trees as they stood in the forest".

In the case of Lynch v. United States, 138 Fed. 535; 71 C. C. A. 59, tried in Montana, for conversion of timber from the public domain in that state, decided by the Circuit Court of Appeals for the Ninth Circuit in 1905, the jury was instructed that if the conversion was an innocent one the Government was entitled to recover "merely the value of the timber as it stood on the land before being cut".

In the recent case of H. D. Williams Cooperage Co. v. U. S., 221 Fed. 234, decided by the Circuit Court of Appeals for the Eighth Circuit March 1, 1915, it was held that in the case of an innocent conversion the measure of damages was "only for the value of the timber in its original place".

In the recent case of C. A. Smith Timber Co. v. Auld, 218 Fed. 824, decided by the Circuit Court of Appeals for the Eighth Circuit Nov. 25, 1914, the Court stated (p. 826) that

> "the charge of the trial Court correctly set forth the measure of damages, if the jury believed Sand's trespass and conversion were due to mistake or inadvertence."

Recourse to the Transcript of Record in that case as it was before the Circuit Court of Appeals for the Eighth Circuit shows at page 142 that the trial Court instructed the jury as follows:

> "Now, if from the evidence you believe in this case that there was a cutting in good faith by Mr. Sands, that is, that he cut that timber in the honest and reasonable belief that he had a right to cut it, then there can be no recovery in this case, except for nominal damages and that recovery would have to be against all of these defendants, because under this testimony there can be no question but that all of these defendants did, subsequent to the cutting of this timber, exercise the right of possession and dominion over the property of these Aulds, this timber. But the reason why there can be no recovery except for nominal damages, that is for a dollar, or some insignificant sum like that, is that the plaintiffs have failed to prove the stumpage value of that timber, and, in the case of a cutting in good faith, neither Sands, nor any of the other defendants, would be liable for more than the stumpage value, and there being no proof of what the stumpage value was there can be no recovery, except for nominal damages, because we don't know what the extent of the damage was."

It is interesting to note that the Land Department of the United States, after a very able and thorough review of all the authorities, has reached the conclusion that the rule laid down in United States v. St. Anthony R. R. Co.,

supra, is the rule by which the Land Department must be guided, and that that rule fixes the measure of damages, in cases of innocent conversions, at the value of the timber after it has been severed from the soil, and not its stumpage in the standing tree. After reviewing the prior practice of the Department, which had fixed the measure at the stumpage value, the Commissioner says, under date of April 1, 1912:

> "This office, therefore, in view of the rule laid down in the St. Anthony Railroad Company case by the United States Supreme Court, which is the highest authority, concludes that in all cases of innocent trespass where the timber has been converted by the trespasser or innocent vendee from such trespasser, the measure of damages should be the value of the timber after same has been severed from the soil, instead of the stumpage or standing value of the timber as has been the rule in previous cases.
>
> Decisions of the Department of the Interior Relating to Public Lands, Vol. 40, p. 525.

It is also interesting to note that precisely the opposite conclusion was reached by Judge Lowell, in a case, however, to which the Government was not a party,—Trustees of Dartmouth College v. International Paper Co., 132 Fed. 89. After reviewing all the authorities, including United States v. St. Anthony Railroad Co., supra, Judge Lowell concludes (p. 106) that the weight of authority "supports the allowance of stumpage only" —i. e. value before severance.

Upon the hearing of the motion for a new trial plaintiff's counsel took the position that in this case Judge Lowell recognized that the Supreme Court of the United States had never expressly considered the distinction

between the stumpage value and the value that may be reckoned by deducting the cost of manufacture from the finished product. Such, however, is not the case. What he does say is this (p. 106):

> "In United States v. St. Anthony R. R., 192 U. S. 524, 24 Sup. Ct. 333, 48 L. Ed, 548, the parties had agreed that the value of the timber where cut was $1.50 per thousand, and upon delivery to defendant was $12.35. The Court held that the cutting was in good faith, and said, 'We think the measure of damages should be the value of the timber after it was cut at the place where it was cut'. Page 542, 192 U. S., p. 339, 24 Supt. Ct., 48 L. Ed. 548. While the language thus used by the Supreme Court, upon the whole, approves as measure of damages *the value of the logs immediately after their separation from the freehold,* it is plain that the differenee between *this value* and *stumpage* has never been expressly considered by that Court."

The only question which Judge Lowell was there considering was whether the measure, in cases of innocent conversion, was the stumpage value in the standing tree or the value immediately after severance,—in other words, whether the value added by the labor of severance should be deducted. It is of this that the learned Judge says that

> "it is plain that the difference between *this value* and the *stumpage* has never been expressly considered by that Court."

And the learned Judge concludes by saying that

> "the weight of authority outside the Supreme Court, on the whole, *supports the allowance of stumpage only.*"

Counsel for the Government seeks to have the Court adopt both a time and place of conversion absolutely

different from that laid down by the United States Supreme Court. The instruction complained of told the jury to assess the damage by deducting from the *selling price* the *cost* of manufacture.

In other words, the instruction states the time and place of *sale* as the time and place of conversion, and arrives at the net damage by deducting the cost of manufacture from the selling price. This difference includes both stumpage value and manufacturer's profit.

But the United States Supreme Court has sanctioned no such rule. It has expressly said that:

1. The *time* when the value is to be ascertained is *the time when the timber is* FIRST *cut.*

2. The PLACE where its *value* is to be determined is *the place where it is cut.*

This the United States Supreme Court has said, not obscurely, but in unmistakable language. That language will not admit of the construction that the value is to be determined at a different place and at a much later time,—long after the logs have been transported to distant mills and there transmuted into lumber, and again shipped to a chain of lumber yards and there sold.

It developed upon the hearing of the motion for a new trial that the necessities of counsel for the Government in endeavoring to find authority for the instruction given by the Court were such that they boldly assailed the rule laid down in the St. Anthony Railroad case, supra, as *dictum* and in a like manner they attempted to brush aside the mass of decisions in the Federal Courts which follow the St. Anthony case or

which had previously laid down the same rule. But what the United States Supreme Court there said is not *dictum*. There is no ambiguity in the language actually used by the Supreme Court. It says what we say it says and lays down the rule for which we contend.

One of the learned counsel for the Government told the trial Court that he once had occasion personally to examine the judgment roll in the St. Anthony case and that he found there was no question raised as to what was the proper measure of damages in a willful or in an innocent trespass. He further said that, in that case, "the parties stipulated, and the stipulation was made a part of the record, that if the defendant railroad company was a willful trespasser it was liable for the manufactured value of the timber at $12.50 per thousand; that if it was an innocent trespasser it was liable for the value of the timber immediately after severed from the soil at the rate of $1.50 per thousand."

If this were all true, it would be asking a great deal of this Court to urge it to ignore the clear and explicit words of the United States Supreme Court and to assume that the Supreme Court misunderstood the record and did not know what it was talking about.

But, in fact, counsel's recollection is absolutely faulty in the particulars just quoted. The record contains no such stipulation as he there refers to, and the *fact is that the question was directly raised as to what was the proper measure of damages in a willful or in an innocent trespass.*

It may be that this argument will not now be advanced by plaintiff's counsel before this Court, but as we may

have no opportunity of reply to same if it be again put forward, we feel it incumbent upon us at this time to place within the easy reach of the Court just what the record in that case does disclose. Excerpts therefrom and our comments in relation thereto will be found in Appendix II at the end of this brief.

There is nothing said, even by way of *dictum* in any case ever decided by the United States Supreme Court which indicates a different rule than that the measure of damages in cases of innocent conversion is the value of the timber converted *at the time and at the place where it is cut.*

Wooden-Ware Co. v. United States and Pine River Logging Co. v. United States, supra, contain *dicta* entirely in harmony with the St. Anthony Railroad case. As is pointed out in the latter case, both of these cases were concerned with timber which had been cut willfully and in bad faith. Anything said therein with regard to the measure of damages in cases of innocent trespass is of course *dictum.* But what was actually said in Wooden-Ware Co. v. United States (106 U. S. 434; 27 L. ed. 230), was this:

> "On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property *when first taken* must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition."

(And this language was repeated substantially in the Pine River Logging case, 186 U. S. 279; 46 L. ed. 1164.)

Counsel seem to think that the three last lines above quoted are favorable to their contention. But it should be noted that the result of the rule is, that the amount of the recovery is the same whether the suit is brought for the innocent conversion of *logs* or for the innocent conversion of the finished *lumber*.

The language of the Supreme Court is that the defendant is to be credited with the "*value*" which his labor has added to the timber. It does not say that he is to be credited with the mere cost of the labor which has gone into the lumber. The *value* which his labor has added is a very different thing from the mere cost of that labor. The labor gives the lumber a market value, and that market value includes the manufacturer's profit. The difference between the stumpage value and the market value of the lumber is "the value which has been added by the work of the defendant", to which the Court refers.

The following quotation is in point in this connection and makes the matter very clear:

> "The measure of damages in this case should be the value of the timber on the stump, as it was in its natural state and position. This may be ascertained by starting and ending with the value on the stump, as the simplest and most direct way. If, however, in trying to arrive at such value, we start with the market value of the lumber at the mill, we should be careful to deduct not simply the cost of converting the timber into lumber, but the value added to the value of the timber on the stump by the time, skill, labor and expenditures employed in the process of manufacture. *If, therefore, the market value of the lumber at the mill includes any profits of manufacturing, such profits must be deducted;* otherwise you would give the plaintiffs not only the value of the

timber on the stump, but, in addition thereto, the profits of manufacture, which enter as an element of market value under normal conditions."

Lewis v. Virginia-Carolina Chemical Co., 69 S. C. 364; 48 S. E. 281.

In principle this is obviously as it should be. *What possible reason could there be to make the innocent trespasser suffer more in the one case than in the other?* The law, in such cases, aims to give compensatory, not punitive, damages.

The actual damage to the owner of the land, in the case of an innocent trespass, is exactly the same whether he sues immediately after severance or after the timber has been sawed into lumber. If the trespass is innocent the owner is entitled to compensation and no more. He is entitled to nothing by way of punishing the defendant, and it would be an utter absurdity for the law to allow him a greater net sum if the innocent trespasser makes lumber than if he makes logs!

Upon the hearing of the motion for a new trial there was not a single case cited by counsel for the Government which even tends to sustain the instruction of the Court here, unless it be Winchester v. Craig, 33 Mich. 205. In that case it appeared that the value of the standing timber was $1.50 per thousand feet, and that the value of the logs in Detroit was $12.00 per thousand feet. The Court instructed the jury to allow the market value at Detroit, less the sum of money which the defendants had expended in bringing it to market. This instruction was complained of by the *plaintiff*, who insisted that he was entitled to the value at Detroit

without deduction, and plaintiff appealed on that ground; but the Supreme Court of Michigan held that the instruction was *"as favorable as the plaintiff had any right in this case to expect"* (p. 215).

And the Court continues (p. 215):

> "This was allowing the plaintiff more than the value of the timber when it was first severed from the realty. It did not permit the defendants to recover any profit upon what they had done, but protected them to the extent of the advances they had made; and this, we think, was correct."

The remark of the Court that "this, we think, was correct", is pure *dictum.* It would have been a direct authority if the *defendant* had objected to the instruction as improperly allowing the recovery of his manufacturer's profit; but, since the plaintiff—not the defendant—was complaining, and since the instruction was *"as favorable as the plaintiff had any right in this case to expect"*, the remark that it was correct not to permit the defendants to recover (retain) any profit, was mere *dictum.* The objection to the instruction is that it was too favorable to the plaintiff, and it is to be noted that in the vast number of cases reviewed in the opinion in Winchester v. Craig, not one is cited which would sustain the rule giving over to the plaintiff not only the value of the goods when converted, but the profits thereon as well.

The important thing to be noted with regard to Winchester v. Craig is that it stands virtually alone in the jurisprudence of the United States in what it says about profit.

Winchester v. Craig was decided in 1876. Judge Cooley, as counsel point out, participated in the decision. The opinion was by Marston, J. Of the four Justices who participated, Chief Justice Cooley concurred. Campbell and Graves, JJ., concurred in the result *but not in the opinion.* Its authority is much weakened, to say the least, by a later Michigan case in which Judge Cooley also participated. On June 10, 1885—nine years later—the Supreme Court of Michigan, in Ayers v. Hubbard, 23 N. W. 829 (all the judges concurring), in effect overruled Winchester v. Craig on the particular point in controversy. It appeared there that the defendant's firm, owning some timber land, let a contract to one Montgomery to cut logs and timber during the winter, and haul and put the same afloat in Willow Creek for the aggregate price of $3.50 per thousand feet. Montgomery, it seems, through innocent mistake, cut over the plaintiff's line.

The Court said (pp. 829, 830):

> "It appears from the testimony that the land of plaintiff, from which the timber was taken, sought to be recovered for, is about three and one-half miles from Willow Creek, at the point where Montgomery delivered them to the defendant, and the plaintiff claims that he should recover the value of the logs at that point delivered in the creek. The defendant, on the contrary, insists that the conversion, if any, was by his servants in the woods where the timber stood upon plaintiff's land, and that the damages for which he was liable, if any, was the value of the stumpage. The court instructed the jury in accordance with the views of plaintiff's counsel, and the verdict of the jury was rendered accordingly. * * *

"We think the circuit judge erred in his instruction to the jury. We discover nothing in the case indicating any willful or negligent trespass upon the part of the defendant or the company's employees. The general rule of damages is the value of the property lost under such circumstances *at the time and place of conversion.* The declaration avers plaintiff's possession of the land, and the ownership of the property taken, and that upon the land the property was taken, and there came to the possession of the defendant by finding, and on the same day and place the defendant converted the same. The record shows this declaration supported by the proofs. Complete indemnity for the actual loss sustained in this case by the plaintiff is what he was entitled to recover. * * *

"* * * The judgment must be reversed and new trial granted."

(E) The rule adopted by the United States Supreme Court is the rule which prevails in most of the states.

The decisions of most of the state Courts, in suits between private individuals, accord with the rule adopted by the United States Supreme Court in Government timber cases. In other words, the Government, acting through its Courts, has seen fit to adopt in its own cases the same rule which is recognized by the great weight of authority as the proper rule to apply to cases between individuals. If we concede that the Supreme Court of the United States might adopt a different, and even more stringent, rule for cases wherein the Government is a party, the point is that it has not done so. This Court must, of course, follow the United States Supreme Court, whatever its own views may be as to the proper measure.

The following cases are among those which show how general the rule is which the Federal Courts have elected to apply to conversions of Government timber:

Minnesota:

King v. Merriam, 38 Minn 47;

State v. Shevlin Carpenter Co., 62 Minn. 99.

Washington:

Chappell v. Puget Sound Co., 27 Wash 63.

Mississippi:

Bond v. Griffin, 74 Miss. 599.

New York:

Clark v. Holdridge, 12 App. Div. 613.

South Carolina:

Lewis v. Virginia-Carolina Co., 69 S. C. 364.

Texas:

Young v. Pine Ridge Lumber Co., 100 S. W. 784.

New Hampshire:

Beede v. Lamprey, 64 N. H. 510.

Pennsylvania:

Forsyth v. Wells, 41 Pa. St. 291.

Alabama:

White v. Yawkey, 108 Ala. 270.

Maryland:

Blaen Co. v. McCulloh, 59 Md. 403.

Wisconsin:

Weymouth v. Chicago R. R., 17 Wis. 550.

Massachusetts:

Saunders v. Clark, 106 Mass. 331.

Vermont:

Tilden v. Johnson, 52 Vt. 628.

(F) It is a fallacy to contend that the application of the rule of stumpage value permits a wrong-doer to profit by his own wrong.

With the overruled *dictum* of an early Michigan case as the only precedent to support the instruction given by the trial Court we naturally expect the proposition to be advanced that if the wrongdoer is credited with the cost of manufacture, he should not object to pay stumpage value plus the profits made (if any) in his wrongful enterprise. This contention is most readily answered by the consideration already adverted to that it ordinarily is the function of Courts to award *compensation* only to the injured party and this is ordinarily achieved where stumpage value is allowed. If by the severance of the trees there is injury in some form or other to the freehold the injured person can by suing in trespass *quaere clausum fregit* recover, in effect, the value of the stumpage plus such additional injury as may have resulted to his freehold. Thus, by one method or the other, without attempting to transfer from the pocket of the wrongdoer to the injured person the profits the former may have apparently made—a matter involving considerable speculation—is compensation placed within reach of the injured person. An awarding of any greater amount than what is compensation must necessarily rest on the theory of punitive damages, since damages are of but two kinds—compensatory or punitive. The accidental circumstance that the innocent wrongdoer after severing the tree manufactures the timber into lumber is of no concern to the injured party. He has suffered in the same way and in the same amount whether the log

remains a log or is manufactured into the most finished of lumber products.

But let us assume that in a specific case an apparent profit has resulted to the wrongdoer. Whether that apparent profit really is profit is not to be determined by merely deducting the cost of manufacture from the market price of the finished product. In the first place, standing timber is a commodity and, given the same grade, one tree is as good as another to the lumber manufacturer. If the defendant manufacturer had not taken A's trees wrongfully though innocently, he presumably would have purchased from A, or some one else, the same or other trees and in the transmuting of these trees into lumber would have made precisely the same profit. It is not as though other trees were not available. That there is a market value for the trees wrongfully taken itself implies the existence of other available timber for the purpose. It will thus be seen, viewed from this aspect, that there really is no profit resulting to the innocent wrongdoer from converting the timber. In a word, he does not make any other or different profit from the fact that he is a wrongdoer. Therefore, he cannot be said to have profited by his wrong, which leads to the inevitable conclusion that to compel him to restore this apparent profit is in reality to mulct him in punitive damages.

Again, viewed from another aspect, the question rather is as to whether or not by reason of the transaction a greater or less gain to the wrongdoer accrued than at the time was resulting generally from similar human endeavor and investment. If the wrongdoer made more

than was currently being netted in other industries from like effort and investment, then perhaps it might be said that he profited by his own wrong, provided he could not obtain elsewhere the stumpage for his mill. If he made less—though still technically showing a profit, that is, an excess in the market value of the finished product above the cost of manufacture—he was in no sense profiting by his wrong. This condition is peculiarly and regrettably true of the lumber industry and something of which this Court may well take judicial notice—when the Federal Trade Commission is just now concluding its inquiry as to the prolonged depression in that industry. It is reasonably safe to say that at any time the same investment and activity devoted to the lumber industry would have yielded much greater profits if applied to any of our other industries. Furthermore, if the period covered by a wrongful conversion be alone looked to, and, in an isolated sense, it has been a profitable one, what of the "lean" years preceding where the investment has brought no income at all and possibly serious impairment of capital. These bad results do not manifest themselves as a bookkeeping proposition, in determining the cost of manufacture during the isolated period in question. We realize that the considerations last set forth are purely hypothetical and speculative, but we do earnestly urge that as we are all agreed that in the case of an innocent conversion the wrongdoer should not be subjected to punitive damages under any consideration, it is of greater importance that a rule should be adopted—as it has been adopted—which under no circumstances can operate to subject the innocent

wrongdoer to punitive damages, than that a principle should prevail which must in its very nature render it exceedingly uncertain whether its application has not resulted in mulcting such innocent wrongdoer in punitive damages.

It is, we respectfully submit, entering upon a speculative field of inquiry for a Court or jury to at any time undertake to determine what the profit has been in the manufacturing of an isolated lot of logs. The time-honored rule should be maintained—there is no middle ground—stumpage value in cases of innocent conversion and the value of the finished product in cases of willful conversion. These thoughts lead to the applicability of the instruction to the case at bar.

(G) The Court's instruction as to the measure of damages in cases of innocent conversion was inapplicable to the case at bar.

A more inopportune case than that at bar in which to attempt the introduction into the Federal Courts of this discarded Michigan *dicta* could not well be imagined. The thing seems to have been an afterthought. There was nothing in the complaint to indicate a departure from the conventional and well settled rule. It alleged (Tr. p. 4) that the value of the converted timber was

> "one dollar per thousand feet, board measure, while standing; that the value of the same after being felled and prepared for sawing into lumber was five dollars per thousand feet board measure, and that the value of the same after being manufactured into lumber was ten dollars per thousand feet, board measure,"

and judgment was prayed for at the rate of ten dollars per thousand feet, board measure (Tr. p. 6).

These were appropriate allegations to meet the varying conditions the proof might develop for the application of the well recognized measure of damages in the respective cases of innocent and willful conversion. In all this there was nothing to indicate that there would be recourse to the discarded Michigan *dicta*. Had the companies or persons directly committing this alleged conversion been parties defendant, then, if the Court's instruction as an abstract proposition of law be sound, there would be no question of its applicability. In that case the defendant would have received the profits (if any) which the Court directed the jury to restore to the Government. The principle contained in the Court's instruction can obviously have no just application where an innocent agent of an innocent principal commits the wrong. The innocent agent does not receive any profit from the transaction and *as to him* the measure of damages should be the stumpage value—the tree as it stands —however it might be as to the principal. In the case of the innocent agent not participating in the profit there can be no middle ground. He is liable either as a willful trespasser or as an innocent trespasser, and if the latter he has received no profits and having received no profits he cannot be justly required to pay them over to the injured party.

In the case at bar it is not pretended that defendant participated in the profits, if any, of Fenwick or W. H. Hammond and his interest in Big Blackfoot Milling Company was about a one-fifth of its capital stock. As will

have been observed in reading Topic II above, the conversions attributable to that company, which only came into existence in November, 1891, are negligible. It results, therefore, that to apply the Court's measure of damages for an innocent conversion to one situated as was defendant is to impose punitive damages upon him and direct a recovery of profits from him which he never received.

The instruction was further inapplicable to the case as there was not a *scintilla* of evidence offered to establish the cost of manufacture or in any other way the profits, if any, derived from the conversion of the tree into the finished product. The general burden of the Government witness Hathaway's testimony was to the effect that there was no profit made at all and this is particularly true of the years during that part of the period involved in the complaint, namely, 1892, 1893 and 1894, when Big Blackfoot Milling Company was operating and which included the historic depression of 1893 and the slump preceding and following it (Tr. p. 221).

2. The court erroneously directed the jury to allow interest.

Inasmuch as interest is sometimes regarded as an element of damages and at others is considered as interest, *eo nomine,* we have been in large measure compelled to anticipate a discussion of this topic in that last preceding, namely, as an element in the measure of damages applicable. In this connection we have seen that by the statute law of Montana prevailing during the period covered by the conversion interest was not

recoverable and we have argued that this Montana statute must control.

Apart from this statute, an examination of the cases cited under this topic in which the Government has sought recovery as for a conversion of timber cut upon the public domain, will disclose that in nearly all such cases interest has not be allowed—though the point may not have been discussed by the Court. The unanimity to be found in the decisions in their failure to allow interest is, we submit, so pervading as to almost compel the necessary deduction that non-allowance of interest has been crystallized as the principle applicable in the Federal Courts in this class of cases.

We submit that the rule which the United States Supreme Court has adopted does not allow interest. It is laid down flatly in the St. Anthony Railroad case, supra, that

> "*the measure of damages should be the value of the timber after it was cut at the place where it was cut.*"

And the unmistakable intention of the Court to exclude interest from the computation is shown when the Court declares that:

> "The judgment must be reversed and the case remanded * * * with directions to enter judgment in favor of the United States for the amount of the timber as stated in the answer, and for its value at the rate of $1.50 per thousand feet."
>
> United States v. St. Anthony R. R. Co., 192 U. S. 543; 48 L. Ed. 548.

The Court would certainly have allowed interest if it had intended to announce a rule which would allow it.

The conversion of timber in that case had taken place four years before the Court ordered judgment.

How, then, can this Court add a rider to the rule and allow interest for a quarter of a century?

There is no excuse for a radical departure of this character here.

The most that the common law of England has ever done is to allow interest in cases of conversion, in the discretion of the jury.

> "In actions for conversion the measure of damages is ordinarily the value of the goods. * * *
>
> "Interest may be allowed in addition to the value of the goods at the time of conversion *if the jury think fit.*"
>
> Halsbury's Laws of England, Vol. 10, pp. 344, 345.

Owing, doubtless, to the fact that no statute of limitations runs against the Government, and that suit may be brought by it after a very long lapse of time—here a quarter of a century—our Supreme Court has concluded not to allow interest at all.

But if interest is ever to be allowed in such cases brought by the Government—and we submit that it is not—then, in accordance with the practice in the Federal Courts, it can be allowed only in the discretion of the jury. In other words, the Federal Courts will follow the English common law rule, not the rules laid down in state Courts, which generally are dependent upon some local statute.

A recent case to which the United States was a party, and which has a particular bearing upon the question of

interest, is White v. United States, 202 Fed. 501, 121 C. C. A. 33, decided February 4, 1913, by the Circuit Court of Appeals for the fifth circuit. That was an action for converting timber from public lands. It holds that there is no absolute right to interest in such cases, *also that a long, unexplained delay in instituting the action, in effect, divests the jury of discretion in the premises—in a word, that under such circumstances, it would be an improper exercise of discretion for the jury to allow interest.* The Court says (p. 502):

> "The verdict and judgment show, and the parties concede, that interest was allowed by the jury from the date of conversion to the date of trial—a period of 13 years—aggregating $2,152.50, almost one half of the entire judgment. The oral charge of the Court is set out in the bill of exceptions in its entirety, and contains no reference to the question of interest. Interest in actions of tort in the federal courts is not allowable as a matter of right; but its allowance, as part of plaintiff's damages, is discretionary with the jury. Eddy v. Lafayette, 163 U. S. 456, 458; 41 L. Ed. 225.
>
> "The jury were not instructed by the Court below that they possessed any such discretion, and probably included interest in their verdict upon the idea that the plaintiff was entitled to it as a matter of right, and not of discretion.
>
> "It is true that plaintiffs in error do not assign error because of this omission of the Court, but a plain error may be noticed by us, in the absence of any assignment. In view of the long and unexplained delay on the part of the Government in instituting the suit, we feel that a proper exercise of discretion by the jury would have denied the plaintiff interest."

The United States Supreme Court also has said:

> "It may be that in the absence of statute the general rule is that in actions for tort the allowance of interest

is not an absolute right; *Lincoln v. Claflin,* 7 Wall. 132; *The Scotland,* 118 U. S. 507; *District of Columbia v. Robinson,* 180 U. S. 92; *Frazer v. Bigelow Carpet Co.,* 141 Mass. 126; but the Oklahoma statute has made interest a part of the detriment caused by the conversion of personal property. Other states have done the same."

Drumm-Flato Co. v. Edmisson, 208 U. S. 534, 539; 52 L. Ed. 606 (a case of conversion).

"Undoubtedly the rule in cases of tort is to leave the question of interest as damages to the discretion of the jury."

Eddy v. LaFayette, 163 U. S. 456, 467; 41 L. Ed. 225.

"Interest is not allowable as a matter of law, except in cases of contract, *or the unlawful detention of money.* In cases of tort *its allowance as damages rests in the discretion of the jury.*"

Lincoln v. Claflin, 7 Wall. 132, 139; 19 L. Ed. 106.

See also:

District of Columbia v. Robinson, 180 U. S. 92, 107; 45 L. Ed. 440.

And even in cases of the unlawful detention of money, the Government will not be allowed interest if it has been guilty of laches in prosecuting its claim.

United States v. Sanborn, 135 U. S. 271; 34 L. Ed. 112.

Touching this last suggestion, counsel upon the hearing of the motion for a new trial, said that in the case at bar there was no laches. But we know that all of the facts concerning the Edgar claim were investigated by Government agents as early as 1885 (see Topic II, *sub-*

head "Edgar Claim"), and that the Government brought suit to enjoin cutting on the Hellgate the same year (supra p. 60).

In any event as appears from the case of U. S. v. Sanborn, supra, the burden is upon the Government to account for a long delay intervening between the accrual of a cause of action and the time when suit thereon is commenced, which it is not pretended the Government has attempted to do.

In answer to the general proposition that interest is to be allowed only in the discretion of the jury, counsel appeared to be sorely pressed for authorities with which to meet those cited by us.

They quoted from Harrison v. Perea, 168 U. S. 311; 42 L. Ed. 478. While that opinion does speak of the "conversion of the whole assets of the estate", *the action nevertheless was not a suit at law for conversion.* It was a bill in equity for an accounting; and everyone knows that in equity interest will be allowed wherever justice may seem to require it.

Counsel also quoted a *dictum* found in United States v. Pine River Logging Co., 89 Fed. 907. This is the same case which afterwards went to the United States Supreme Court and was finally determined in 186 U. S. 279, 293; 46 L. Ed. 1164, where it has already become familiar to us.

It is to be noted that the United States Supreme Court not only did not adopt the *dictum* of the trial Court as the law, but approved the rule announced by way of *dictum* in Wooden-Ware Co. v. United States,

106 U. S. 432; 27 L. Ed. 230, *which omits interest entirely.*

The only other case which counsel cited from the Federal Courts upon this matter of interest is New Dunderberg Mining Co. v. Old, 97 Fed. 150; 38 C. C. A. 89, which they declare to be "directly in point." The case was not one to which the Government was a party; it does not involve the conversion of timber, it follows the rule repeatedly declared by the Courts of the state where the conversion occurred,—in fact, it is in point neither on its facts nor on the law which it declares. This appears sufficiently from the following excerpts from the opinion (p. 153):

> "The damages recovered in this case consist of the royalties which the Dunderberg Company had received from ore removed from this mine by its lessees prior to February 15, 1894, when they were enjoined from taking more, and interest on the amount of these royalties from that date. It is assigned as error that the Court instructed the jury that the defendants in error were entitled to this interest. * * * It is a general and just rule that, where interest is reserved in a contract, or is implied from the nature of the promise, it is recoverable *of right;* and that when property or money has been wrongfully appropriated or converted by a defendant, interest should be given as damages to compensate the complainant for the loss of the use of the proceeds of his property or of his funds. *In cases of the latter class its allowance is sometimes a matter of discretion,* but generally, whenever one has wrongfully detained or misappropriated the money of another, he ought to pay and must pay interest at the legal rate from the date of the misappropriation, or from the beginning of the detention."

This is very far from saying that in an action brought by the Government for the conversion of timber, interest

will be allowed as a matter of right, and not at most as a matter of discretion. Nor is it authority that in such cases interest is allowable at all.

Finally, counsel recognizing the weakness of their contention regarding interest took the position that the question of interest did not seem to have been given much consideration by any of the Courts in cases parallel to the one under review.

We submit the question has been considered sufficiently for the Courts to squarely lay down a rule which excludes it.

3. The erroneous instruction concerning the measure of damages applicable as for an innocent conversion and the direction to the jury to allow interest was heeded by the jury and defendant was mulcted accordingly.

The jury returned a verdict in the lump sum of $51,040.00.

It was obviously arrived at by the following method of calculation:

They placed the stumpage value at $1.00 per thousand feet.

16,000,000 feet at $1.00 per thousand	$16,000.00
They took $1.00 per thousand feet as profit	16,000.00
They allowed interest from 1895 to 1912—17 years at 7%—equal to 119% on the stumpage value	$19,040.00
Making a total of	$51,040.00

See supra pp. 7 and 9.

4. The objection interposed by defendant to the instruction setting forth the measure of damages applicable as for an innocent conversion and directing the jury to allow interest was sufficiently specific.

At the outset it is to be noted that if it be the law that interest is not recoverable in a case such as this, then it was error for the Court to permit over the objection and exception of defendant, the amending of the prayer of the complaint so as to include interest (Exception No. 39, Tr. p. 746). This ruling is assigned as error (A. of E. No. 50; Tr. 831). So if the objection and exception of defendant taken to the instruction given by the Court directing the jury to allow interest is not sufficiently specific to permit a review of the instruction, nevertheless the question is properly before the Court in relation to this assignment. But the objection was sufficiently specific both as to the question of interest and the measure of damages in cases of an innocent conversion.

The charge of the Court in the particulars mentioned is set forth at length in this brief at the beginning of this topic. It will also be found (Tr. 769-70, 776). The exception taken by defendant was in the language (Tr. 780) as follows:

> "Next, as to the measure of damages. We except as to the measure suggested by the Court. We claim that the only measure that can exist under the circumstances is the value of the stumpage in the tree and I think your Honor's instructions add to it another element.
>
> "I also except to your Honor's instructions with regard to interest."

The foregoing reads as if it were a single instruction, but the fact is that it is not. The first portion appears

in the middle of a long charge (Tr. 770). It was read to the jury a considerable time (six pages of printed matter marked the interim) before the latter portion was given (Tr. 776), and when it was it came about in this way. The Court finished reading the voluminous instructions and the following took place (Tr. 776):

> "The COURT. Have counsel any suggestions to make?
>
> Mr. HALL. I have no exceptions, but I merely suggest at this time that the rate of interest should be stated to the jury by the Court.
>
> The COURT. The rate of interest is the legal rate of 7%."

If we are to treat what the Court said about interest as constituting two distinct propositions, as the trial Court itself does, then one relates to *interest* and the other to the *rate* of interest.

Our exception was in these words (Tr. 780): "I also except to your Honor's instructions with regard to interest."

If, therefore, the Court must depend as the trial Court would have it do, upon verbal niceties, the fact is with us that our exception strikes directly at the first proposition.

Being sufficient as to that proposition it is enough. The second proposition, if it is to be deemed a separate one, is nevertheless dependent upon the first and falls with it.

At the time this cause was argued before this Court, the opinion of the learned trial judge rendered upon the overruling of defendant's motion for a new trial had not been published, and for the convenience of this Court we appended a copy of same to Part 1 of this brief.

Since the argument said opinion has been published in the Federal Reporter Advance Sheets, dated December 9, 1915.

U. S. v. Hammond, 226 F. 849.

We should here say that we observe some trifling differences in the language in the copy appended to Part 1 of our brief as compared with that published in the Federal Reporter, but we think there is no material change. We shall, however, hereafter refer to the opinion in its published form.

As to the measure of damages the learned trial Court points out (p. 851) that the charge covers two alternative propositions, the first applicable to a willful taking and the second should it be found that it was unintentional or innocent. It then argues that the exception interposed was not sufficiently specific, first in that there was nothing in the language of the exception that would indicate to the Court whether it referred to the first rule stated or the second, and the Court, therefore, could not know to which the objection was intended to apply. Moreover, it argues that if it be conceded the exception sufficiently indicated its application to the rule governing an innocent taking that it was wholly lacking in any intimation that it was objected to on the ground that it directed the jury to include in its verdict against defendant the difference between the expense incurred in manufacturing the lumber and the price for which it was sold—in other words, this, as the element added to the value of the stumpage in the tree, was not specified—or that the instruction was inapplicable to the facts of the case because there was no

evidence offered to show the expense of manufacture of the lumber.

It is our contention that a fair interpretation of the exception plainly shows that it was addressed to the instruction defining the measure of damages as for an innocent conversion, and unless indeed exceptions to the charge of the Court in the presence of the jury are to have the same completeness as characterize formal assignments of error (which we do not understand to be the law) that the language of the exception reasonably directed the attention of the Court to the points which on the motion for a new trial and upon this writ of error are assigned as error. The exception plainly told the Court that the allowance of any other element of damages than the stumpage in the tree was improper. We fail to see how the ground of our objection could have been made any more plain by designating the other element as the difference between the cost of manufacture and the price for which the lumber was sold. Moreover, the charge of the Court itself is not entirely clear as to whether or not in the computation of damages under the rule announced by the Court stumpage value should be first ascertained and determined and the amount so found constitute one item in the verdict; then in addition to such stumpage value that the jury should determine what, if any, profit was made in the manufacture of the logs into lumber (all of which as we have seen the jury did). On the other hand, the instruction as given by the Court might very well have contemplated the jury considering stumpage value as one of the elements of the cost of manufacture, in which event the jury would not

have found as a separate and final element what was the stumpage value and then have considered independently of that whether or not there was any profit in the manufacture, but they would have treated the stumpage value —the value of the raw material—as an element in the cost of the finished product. These two different methods of computation might produce a very different net result. Let us suppose a case, alas too frequent, where the selling price of the finished product did not equal the value of the raw material—stumpage value—plus cost of manufacture. On the argument his Honor, Judge Rudkin, had this undoubtedly in mind when he suggested that to arrive at the measure of damages by deducting the cost of manufacture from the price of the finished product might put the plaintiff in a case such as this in a position where he would not be recovering the stumpage value. If, on the other hand, the method intended to be conveyed by the Court was the allowance of stumpage value at all events against the defendant, and in addition thereto any profits that might have been made over and above the cost of manufacturing the raw material, then the peculiar situation suggested by Judge Rudkin could in no event obtain. Just what method the trial Court intended the jury to adopt is not clear to us. We quote from its opinion at page 853 as follows:

> "Counsel says that the charge is erroneous because, in effect it directs the jury to deduct from the selling price of the lumber the cost of manufacture and bring in a verdict for the difference, thus giving the plaintiff the benefit of any profit upon the business of manufacturing and selling the lumber, whereas it was only entitled, if the taking was other than wilful to the value before manufacture. *If the language will bear this construction, which is not conceded.* * * *"

In view, particularly of the uncertainty as to whether stumpage value should be regarded separately or as an item in the cost of the manufactured article, we respectfully submit that the only precise, safe, specific exception that in the nature of things could be made to the instruction was in just the language used by counsel for defendant, namely, that the only measure that could exist under the circumstances was the value of the stumpage in the tree and then by way of inviting elucidation from the Court if he had misinterpreted the Court's instruction counsel says: "And I think your Honor's instructions add to it another element".

The suggestion by counsel that he thought the Court had added "another element" to the stumpage value in the tree was surely sufficient to indicate to the Court that the objection was urged against the instruction specifying the measure of damages as for an innocent and not a willful conversion (and out of respect for the learned trial Court we would invite this Court's attention to the fact that the trial Court does not claim that it *in fact* was misled or not *in fact* sufficiently advised).

The fact that our exception was qualified so that we claimed that the only measure of damages that could exist "under the circumstances" was the value of the stumpage in the tree, we respectfully submit was sufficiently broad so as to cover our assignment that the instruction was inapplicable (if not erroneous as an abstract proposition of law) for the reason that there was no evidence offered showing or tending to show the cost of manufacture and furthermore that it could not rightfully apply to one situated as was the defendant,

namely, one who was only constructively liable and had not received the profits—the innocent agent of an innocent principal. If, however, we are in error as to this contention that our exception was broad enough to direct the Court's attention to the fact that we claimed the instruction was inapplicable as well as inherently erroneous, then there was no ambiguity and the Court will be held to have been sufficiently advised that we objected to the instruction in so far as it allowed the recovery of anything in excess of stumpage value. Before examining the decisions on this subject, we would suggest to the Court, as we have already noted, there was nothing in the complaint or on the trial to indicate that there would be any attempt to depart from the well settled rule as to the measure of damages for the innocent conversion of standing timber. We had supposed the rule so well settled that we did not request any instruction in the premises. The instruction came as a surprise to us and under the circumstances we submit we did all that could be reasonably expected. On the other hand, the Court had the instructions requested by each side before it for many days and presumably had given mature consideration to that which it finally gave on this subject.

Passing to the charge of the Court concerning interest and defendant's exception thereto, the Court charged as follows:

> "In fixing the amount of any verdict you may find for the plaintiff, you should include interest on the value of any lumber so converted from the date of such conversion to the present time. * * * The rate of interest is the legal rate of 7%."

As noted by the learned trial Court (p. 854) that portion of the instruction following the asterisks was given by the Court upon the conclusion of its charge, and when the Court asked plaintiff's counsel if he had any suggestions to make and plaintiff's counsel suggested that the rate of interest had not been specified. Thereupon defendant's counsel specified his several objections to the charge and concerning interest he stated (Tr. 780):

> "I also except to your Honor's instruction with regard to interest."

No contention is now or ever has been made by defendant that the rate of interest was improper; nevertheless, the learned trial Court (p. 854) states that the charge embraces two distinct propositions—first the right of the plaintiff to interest, and second, the rate by which it is to be estimated. It surely is not for the defendant at such a time and place to be called upon to elaborate the reasons why interest should or should not be allowed, unless the trial Court should seek information in the premises. Our contention concerning interest, as we trust this Court may have learned through the perusal of this brief, is, first of all, that interest is not allowable in this case because it was forbidden by the Montana statute at the time when the alleged conversion was committed in Montana; secondly, that in actions by the Government to recover for the conversion of timber growing on the public domain the Federal Courts have themselves worked out the principle that interest is not recoverable; thirdly, that if the Federal Courts have not thus created their own proper rule for this peculiar

class of cases, then the general rule prevailing in the Federal Courts would forbid a recovery of interest upon the ground that where so long a time has elapsed between the accrual of the cause of action and its enforcement and no sufficient or any excuse is offered for the delay in the commencement of the action, that interest is not recoverable, and finally that at best interest was only recoverable in the discretion of the jury and that the Court erred in withdrawing the question from the jury and directing the recovery of interest as of right.

The learned trial Court seems to consider (p. 854) that in some way the defendant was in fault for not having sought an instruction concerning interest, but here we would beg of this Court to recall that the complaint in this case did not ask the recovery of interest and it was only upon the close of the trial that over the objection and exception of defendant, which is here assigned as error, plaintiff amended the prayer of its complaint to include interest. Under the circumstances we respectfully submit that defendant's counsel were not required to anticipate this question of interest or inform themselves particularly as to the intracacies of the law concerning same. The learned trial Court states (p. 854) that the charge concerning interest "was framed upon the assumption by the Court that its allowance was a matter of right". Such being the case, theoretically at least, when defendant stated that it objected to the charge of the Court with regard to interest it would seem there must have been in the mind of the Court the legal proposition that as a matter of law in the Court's

understanding plaintiff was entitled to interest as a matter of right and that defendant controverted that legal proposition. Thus, on any theory of the case, it would seem that at most the defendant would be here precluded from urging the proposition that the Court should have instructed the jury to allow interest in its discretion. But we do not think this is the law and shall now examine the decisions on the subject.

The learned trial Court, to sustain its ruling, relied upon the folowing decisions of the United States Supreme Court:

McDermott v. Severe, 202 U. S. 600, 610; 50 L. Ed. 1162;

Mobile etc. Co. v. Jurey, 111 U. S. 584, 596; 28 L. Ed. 527.

McDermott v. Severe, supra, was an action by an infant plaintiff to recover damages for personal injuries. In instructing the jury the trial Court correctly stated a number of rules of damages which the jury should consider, among them an instruction permitting a recovery for pecuniary loss directly resulting from the injury, and the only objection made was a general objection to the instruction concerning damages.

In the Supreme Court it was objected that to permit a recovery for a pecuniary loss, as covered in the instructions, would allow the infant plaintiff to recover compensation for his time before as well as after he had reached his majority and that the plaintiff's father was entitled to the former. Very properly, we think, the Court held that if the defendant wished the charge

modified in that respect he should have called the attention of the Court directly to this feature and says:

> "It would be very unfair to the trial Court to keep such an objection in abeyance and urge it for the first time in an appellate tribunal."

It is readily apparent how different the situation there presented is from the case at bar. The trial Court had correctly laid down several elements of damage and, for that matter as an element of damage, measured by the pecuniary liability of the defendant in the case—to some one—even this portion of the instruction was correct. That the defendant was responsible to some one for plaintiff's loss of time, both before and after plaintiff's majority could not be controverted and the instruction correctly laid down the measure of defendant's pecuniary responsibility. In all fairness the Court's attention should have been directed to the fact that inadvertently it had failed to consider the principle that the parent was entitled to the infant plaintiff's services during his minority, and hence the parent and not the boy was entitled to recover for the boy's time during that period. Looking at the proposition in its substance the situation there presented more nearly approximates one where it might be attempted by virtue of a general exception to an instruction concerning damages to raise the question as to whether or not plaintiff had capacity to maintain the suit or that a cause of action was stated. Of course, if the plaintiff has not capacity to sue or no cause of action is stated, obviously it is error to instruct the jury to allow any damages whatsoever; yet it will be hardly contended that under

a general exception to a charge specifying the measure of damages that a party so excepting would be permitted to raise the question that no cause of action was stated or that the plaintiff did not have capacity to sue.

In Mobile etc. Co. v. Jurey, supra, the Court instructed the jury that the measure of damages would be the value of the cotton in New Orleans, where it was to have been delivered, together with interest on said sum at 8% per annum. There was a general exception to the charge. In the Appellate Court, by virtue of its general exception, the defeated party sought to attack the instruction so far as it specified the rate of interest as 8%, claiming that 5%, which is the legal rate in Louisiana, where the contract was to be performed, and not 8%, that of Alabama, where the contract was made, should apply.

The Supreme Court refused to reverse the judgment for this error concerning the rate of interest, inasmuch as the other portion of the instuction, namely, that the measure of damages was the value of the cotton in New Orleans, was correct and the exception to the charge was general. The Supreme Court says the exception "should have pointed out to the Court the precise part of the charge that was objected to."

It will be observed in the case last cited that no objection was made in terms as to the allowance of interest at all. In the case at bar we separately stated our objection to the Court's charge with regard to interest and also pointed out the detail wherein, in other respects, we claimed the measure of damages given by the Court was in error.

Nor do we glean anything from the cases cited from the Circuit Court of Appeals for the ninth circuit referred to in the opinion of the trial Court, which supports his ruling in the case at bar.

Montana Mining Co. v. St. Louis M. & M. Co., 147 Fed. 897, 78 C. C. A. 33, held (p. 909) that objections to instructions noted in general terms as for example, that the instruction "does not correctly state the law", or is "contrary to law", or is "not sufficiently guarded", or is "misleading", or is "inapplicable", are not sufficiently specific and direct to call the attention of the Court to the specific point claimed to be erroneous. This we understand to be the law, but we fail to see wherein it applies to the case at bar.

So in Butte & B. Consol. Min. Co. v. Montana etc. Co., 121 Fed. 524, 58 C. C. A. 634, the Court instructed the jury that the burden of proof was upon the plaintiff in error to prove every material allegation of its complaint. It further instructed the jury that if the plaintiff had failed to prove any material matter or issue the jury must find against plaintiff in error as to such issue and that if the evidence was evenly balanced as to any material matter in dispute in the case the jury must find against the plaintiff and in favor of defendant as to such matter. As a matter of fact this instruction was correct as to all the issues in the case, except the issue raised in the answer by the plea of the statute of limitations and it was contended that as to that issue the charge was erroneous and the Court should have instructed the jury that the burden of proof as to that was upon the defendant in error. The Appellate Court rightly held

that as the exception of the plaintiff in error was to the whole charge to the jury on the subject of the burden of proof, the exception was not sufficiently specific. It said (p. 528):

> "No notice was thereby given to the Court of the nature of the objection which is now relied upon. If the attention of the Court had been specifically directed to the point of the objection undoubtedly the instruction would have been corrected and the jury would have been instructed as to the burden of proof upon that particular issue, if that was one of the material issues of the case."

In the case at bar we specifically directed the trial Court's attention to the matter of interest and to the allowance of a higher measure of damages than the stumpage in the tree, and we submit that if the Court desired a more minute classification of the objection and the grounds upon which it rested it should have apprised defendant's counsel.

It is difficult to deduce a hard and fast rule concerning the particularity with which exceptions should be made. In fairness, again, to the learned trial Court it should be said that as this point was not made at all by the learned counsel for the Government, but was raised by the Court itself in denying our motion for a new trial, it resulted that it did not have our assistance, such as it is, in elucidating the question and in placing before the Court other decisions which illustrate the principles that should control in determining whether or not an exception is sufficient. It will be found that under the decisions, what might be in one instance a sufficient exception will in another be insufficient, even though the

exception might be in the same language and the particular portion of the charge excepted to also in the same language, but the scope of the action, the pleadings, the balance of the charge and the whole conduct of the trial may lead in one case to the determination that the exception was sufficient and in the other that it was insufficient.

Thus in Edgington v. United States, 164 U. S. 361; 41 L. Ed. 467, the trial judge gave quite a lengthy instruction as to the effect of the testimony that had been offered concerning the good character of the defendant. A reading of the charge in this respect will show that the matter of character was discussed from several aspects by the trial Court. The exception taken by defendant was in the following terms:

> "We except to that part of the charge in stating the effect of good character, the defendant claiming that it should not be of force only in doubtful cases, but should be considered by the jury in connection with all of the evidence as to whether or not on all the evidence there is a reasonable doubt."

In holding the exception sufficient the Court (p. 365) said:

> "The paragraph of the charge excepted to does not contain instructions on separate and distinct propositions, some of which are sound and others not so. The subject treated of in the paragraph is the single one of the proper effect to be given by the jury to the evidence of the defendant's good character. A fair understanding of the meaning of the instruction cannot be reached without reading and weighing the entire paragraph. There would have been more room for just criticism had the defendant taken exceptions to sentences or phrases detached from their connection."

In Memphis etc. R. R. Co. v. Reeves, 10 Wall 176; 19 L. Ed. 909, Justice Miller said:

> "As to the charge given by the Court the language of the exception is more general than we could desire. And if the errors of this charge were less apparent, or if there was any reason to suppose they were inadvertent or might have been corrected if specified by counsel at the time, we would have some difficulty in holding the exception to it sufficient. But the whole charge proceeds upon a theory of the law of common carriers as it regards the effect of loss from the act of God, on the contract, so different from our views of the law on that subject, that it needs no special effort to draw attention to it, and it is so clearly and frankly stated as to have made it the turning point of the case."

In this case the Court upheld the exception, though it seems to have been a general one to the charge.

In Felton v. Newport, 92 Fed. 470; 34 C. C. A. 470, there was an exception to that part of the charge of the Court which stated to the jury what were the precautions prescribed by the statute which the defendant railroad company was bound to maintain for the prevention of accidents. A reading of the case shows that the statute in fact required many things of the railroad company some of which were under the facts of the case unquestioned obligations on the part of the railroad company and others of which might or might not have been according to the determination of certain collateral facts in the case, nevertheless, the Court held the exception was sufficient saying:

> "The charge upon this subject was entire and bound up in a single proposition. If it was erroneous in any substantial particular, it would seem that the exception would reach the error especially where it pervades the

whole instruction given upon the subject to which the exception relates."

In Hindman v. First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, Mr. Justice Lurton, afterward of the United States Supreme Court, upheld an exception, which was merely as follows:

"We desire to also except to the Court's measure of damages in this case."

What the Court said on this subject was this:

"If the jury should conclude that the plaintiff is entitled to recover anything, then the measure of the plaintiff's damages would be the difference between the value of the eighty shares of stock on the 31st day of December, 1892, and its value of February 6, 1893, when the plaintiff bought it. Interest may be allowed on this, if the jury see fit. For any depreciation which may have resulted after the latter date the defendants would not be responsible, inasmuch as that depreciation may have been the result of causes with which the defendants had no connection."

Mr. Justice Lurton held that he did not think the trial judge could have misapprehended the scope of the exception and that the charge on this subject of damages might be regarded as constituting a single subject. Citing the case of Felton v. Newport, supra.

Now it will be observed that in the charge of the Court, as quoted above, there were many facts stated therein and which it might be well argued the party excepting to the charge might have desired to attack as being mis-statements of the evidence and there are at least three distinct legal propositions involved. Again, it could just as well be argued as has been contended

by the learned trial Court in the case at bar that this charge contained two or more several subjects. The Court instructs the jury "that interest may be allowed on this if the jury see fit". It might be argued in this case that the mere taking exception "to the Court's measure of damages" might have been directed to the element of interest, or might have been directed to other features of the charge concerning the measure of damages. It might have been argued in that case that the charge in respect to interest being correct, therefore, the general exception taken to the measure of damages would not avail so as to bring in question the other portion of the charge which was unsound, but as will be noted the exception was held sufficient.

In the case at bar the learned trial Court has we respectfully submit indulged in a refinement of the rule, which is not borne out by any authority whatsoever.

In Pritchett v. Sullivan, 182 Fed. 480, 104 C. C. A. 624, the Circuit Court of Appeals for the Eighth Circuit had before it the sufficiency of an exception taken to the charge in an action for false imprisonment. The legal proposition involved was as to when and under what circumstances a police officer might lawfully make an arrest without having a warrant and the charge was quite lengthy in respect thereto (p. 482).

The language of the exception and the Court's ruling as to its sufficiency is as follows (p. 483):

> "It is contended that no sufficient exception was taken to the charge. At the conclusion of the charge, counsel said:

"'Defendants except to all that part of the instruction concerning the right of police officers to arrest without a warrant.'

"The Court said:

"'Do you contend that I have transgressed the law in that respect?'

"And counsel replied:

"'Didn't give the law as I understand it.'

"We think the exception sufficient. The Court had repeatedly declared that there could be no lawful arrest without a warrant except upon view of the commission of the offense. The exception was directed to that particular part of the charge, and it was as definite and precise as if counsel had excerpted the exact language of the Court and appended an exception to it. The inquiry made of counsel did not call for his view of the law further than already indicated, nor an explanation of the reasons for his exception. Perhaps counsel should have been more explicit if the Court had acted inadvertently or its language had been unhappily chosen to express a correct view of the law."

The same Appellate Court in the case of Humes v. United States, 182 Fed. 485, 105 C. C. A. 158, where the defendant in the trial Court had put in evidence his good character for truth, varacity and honesty, the Court had charged in respect thereto, and defendant's counsel had taken the following exception:

"I also desire to save an exception to the charge of the Court given as to the effect of the defendant's good character."

The appellate Court said:

"Counsel for the government contends that the exception was not sufficiently specific. All that was said by the learned trial judge on the subject of "reputation" or "character", which appear to have been used interchangeably, occupied a very little space and consisted practically of but one legal proposition, namely, that the

possession of a good reputation by a person charged with crime "only accentuates the measure of his responsibility" and enables him the better to impose upon others. This expression of view is so strikingly out of harmony with the accepted law governing the value of personal character in criminal trials that an exception in general terms like those employed could not have been misunderstood by the trial judge. It pointed unerringly to the vice complained of. Under authority of the case of E. J. Pritchett et al. v. Samuel Sullivan (C. C. A.), 182 Fed. 480, just cited, and cases therein cited, the exception as taken was sufficient."

See also

Horn v. United States, 182 Fed. 721, 742, 105 C. C. A. 163.

Southern Pacific Company v. Arnett, 126 Fed. 75; 61 C. C. A. 131, illustrates well the fair working of the principle. On the theory that this action against the railroad company was one in tort rather than in contract, it was error on the part of the Court to direct the jury to allow interest, instead of leaving it in the discretion of the jury. Concerning this the Court (p. 80) says:

"The entire charge of the Court concerning the measure of damages is contained in a single paragraph, and the only complaint of it before the jury retired was a general exception 'as to the measure of damages'. No exception was taken to the allowance of interest, nor was the attention of the Court in any way called to the question of law relating to it. Counsel for defendant by their silence waived any objection to the charge upon this ground, and the error in this respect is not here for our consideration." (Citing cases.)

But in the case at bar we singled out and specified our objection to the charge allowing interest as well as

the Court's measure of damages for an innocent conversion.

In conclusion we submit the exceptions to the charge concerning interest and the measure of damages as for an innocent conversion were up to the standard required by the most technical. However, if not sufficient, to use the language of Mr. Justice Miller, supra, is there "any reason to suppose they (the errors in the charge) were inadvertent or might have been corrected if specified by counsel at the time".

The opinion of the learned trial Court rendered upon the motion for a new trial after deliberation and much argument, approves of the charge as given by it, at least as to the measure of damages—and approves of it not only as an abstract proposition of law but as well in its applicability to the case at bar. It is apparent that the instruction would have been given just as it was given no matter how elaborate had been the defendant's exception.

The opinion does not make it so clear what the Court would have done had it had before it the rule sometimes prevailing that interest may be recovered in the discretion of the jury. The Court now tells us it assumed that interest was allowable in such a case as a matter of right. As a matter of fact we assumed, and we still contend it to be the law so argued upon the motion for a new trial, that interest was not recoverable at all—not even in the discretion of the jury. As has been noted it was only on the close of the trial that the plaintiff amended the prayer of its complaint, over our objection, so as to seek the recovery of interest.

Naturally, under the circumstances, we had not given the matter much thought, nor had we asked for any instruction on the subject. When the Court did instruct the jury to allow interest, at that time it was neither our obligation nor our right to propose instructions on the subject. We objected to the instruction as it was given. We did not have to object to instructions that were not given. If an instruction to the jury to allow interest in their discretion had been given we would, of course, have objected to that. Even had we thought of it, it would have been quixotic to suggest to the Court that interest was recoverable in the discretion of the jury only to deny the validity of the suggestion by taking an exception to the principle when incorporated in the charge. An objection to an instruction as given is sufficient without framing a counter-instruction that is satisfactory. It was enough for us to say that the charge allowing the recovery of interest was wrong without further saying to the Court and if you change it so as to make the recovery of interest discretionary with the jury we shall except to that also. Sufficient for the day is the evil thereof. Is defendant to be mulcted in the sum of $19,040.00, because his counsel failed to object to an instruction which the Court omitted to give and which plaintiff did not ask for?

As noted, page 11 supra, precedent is not wanting for the striking out of such an interest item and that too where no instruction whatsoever on the subject of interest was given, where none had been asked, and where the awarding of interest was not assigned as

error, nor even the point raised by counsel in the Appellate Court. So in the case at bar we respectfully submit there is no necessity for sacrificing justice on the altar of technicality.

TOPIC V.

THE COURT ERRED IN INSTRUCTING THE JURY THAT IF THE MANNER OF THE TAKING OF THE TIMBER WAS SUCH AS TO ENHANCE PLAINTIFF'S DIFFICULTY IN ESTABLISHING THE EXACT EXTENT OF THE DAMAGE THE PROOF NEED NOT BE OF THAT PRECISE EXACTITUDE WHICH WOULD BE REQUIRED UNDER OTHER CIRCUMSTANCES AND IN FAILING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT THAT IT WAS INCUMBENT UPON PLAINTIFF TO SHOW BY A PREPONDERANCE OF THE EVIDENCE BY WHOM THE TIMBER WAS TAKEN AND THE QUANTITY THEREOF.

Assignment of Error, No. 7, page 22 supra, sets forth the charge of the Court (Tr. 767-9) in this particular which is as follows:

> "If the jury find that the timber sued for or any portion thereof was taken and converted by the defendant and his associates as alleged, then it will be necessary to determine the quantity and value of that so taken in order to fix the amount of your verdict. In a case such as that disclosed by the evidence this is an inquiry of some difficulty. The transactions involved not only date far back in time but cover a series of years, and that alone would tend to render proof more difficult than if those transactions were more recent. But if you find that the taking was wrongful, as is necessary in order to hold the defendant responsible, and that the manner of the taking was such as to enhance the difficulty of the plaintiff in establishing the exact extent of its wrong, then the law authorizes you to indulge every fair and reason-

able inference justified by the circumstances in fixing the amount which the plaintiff has suffered. The proof should tend to establish the amount of damage with comparative or reasonable certainty, but it need not be shown with that precise exactitude which would be required under other circumstances. This is because the law will not permit a defendant to profit by reason of the fact that by his wrongful act he had made the establishment of the exact extent of the injury done difficult of proof. This does not mean that the plaintiff must not prove the extent of his damage, but he is only required in such a case to afford the jury a basis of reasonable certainty for its verdict. Such reasonable basis, however, the evidence must furnish, since you are not permitted to guess or speculate as to the amount of your verdict. If the evidence leaves the question of plaintiff's damage so entirely uncertain that the jury are wholly unable to determine it, then, even though you find the defendant responsible, the plaintiff cannot recover beyond nominal damages."

It is, we submit, harsh enough on the citizen after some twenty-five years have elapsed since an alleged conversion for which he is at best only constructively liable that he should be hailed into Court some thousand miles, or more, from the scene of such conversion to answer therefor, without having that lapse of time made an excuse for less precision or certainty in the proof to be offered by his sovereign than is ordinarily required. Not content with this, the instruction goes on to point to the jury a way in which they can circumvent this obvious and practical requirement of certainty.

"If you find that the manner of the taking was such as to enhance the difficulty of the plaintiff in establishing the extent of its wrong, then the law authorizes you to indulge every fair and reasonable inference justified by the circumstances in fixing the amount which the plaintiff has suffered".

There is only one way that we are advised of in which a tree can be cut and that is by cutting it. The manner of the taking would seem as an abstract proposition of logging to be universally the same and certainly there was nothing in the evidence to show that any bizarre methods were adopted in the case at bar. Is defendant to be made the target for the guesses of the jury as to the amount of timber taken, because, forsooth, after a quarter of a century some of the stumps have rotted or been burned in whole or in part? At best the whole proposition of estimating from stumps the merchantable timber that may have been taken therefrom is guess work to a great extent.

But if the timber had been taken in the unique manner (whatever it is) that the Court had in mind then the jury are told that they are authorized to "indulge every fair and reasonable inference justified by the circumstances in fixing the amount which the plaintiff has suffered". How lucid!—What kind of inference and what are the circumstances which justify it? We do not know. Meaningless jargon as it is we think the net result was to invite the jury to disregard such a mere detail as precision—not to let that stand in the way—and to soak the defendant if they felt like it.

Had the plaintiff in this action been other than the sovereign, the action would have been barred many times over by the statute of limitations. The fact that this favored plaintiff is immune from the statute of limitations and finds itself confronted at the trial with establishing a set of facts, proof of which may have been rendered difficult by the lapse of time, does not

mean that the burden of establishing such proof is in any way lightened.

In U. S. v. Stinson, 197 U. S. 200; 49 L. Ed. 724, speaking of a suit by the Government to set aside a grant of land, the Court said:

> "The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction shall make such an attempt successful.' "

In the case of Chesapeake & Delaware Canal Co. v. U. S., decided by the Circuit Court of Appeals for the Third Circuit, June 7, 1915, 223 Fed. 926, it was held, reversing the trial Court, that while a plea of the statute of limitations would not lie in an action brought by the United States, nevertheless that like any other individual party plaintiff the presumption of payment would be applied where it appeared that more than twenty years had elapsed since the indebtedness accrued.

In reaching this conclusion the Court said:

> "In Courts of justice, facts must be proved in the same manner and by the same means, no matter who the litigants may be. The Government is not privileged merely to lay its claim before such a tribunal and demand allowance forthwith. Speaking generally, it must offer the same evidence as an individual, both in quantity and quality, and if it offers none, or if the evidence be insufficient it fails precisely as the individual fails in similar circumstances. The property of a citizen can only be taken according to the rules and forms of law, and even

if it be the sovereign who is striving to take it by an action in Court, we think the sovereign also should be required to prove his right, and to prove it with the same strictness and according to the same rules as prevail in other cases".

And the Court quoted from the case of

Mountain Copper Co. v. U. S. (C. C. A. 9th Circuit), 142 Fed. 629; 73 C. C. A. 625,

wherein it is said:

"It is the well established law that, when the Government comes into Court asserting a property right it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less."

We respectfully submit that the error in giving this instruction demands of itself and regardless of other errors that the case be reversed and a new trial ordered.

In this same connection we also contend that the Court erred in failing to give defendant's proposed instruction, covering this subject—A. of E. No. 8, supra 30.

TOPIC VI.

THE COURT ERRED IN INSTRUCTING THE JURY THAT THE CIRCUMSTANCES WERE SUCH AS TO THE TIMBER TAKEN FROM THE EDGAR CLAIM, THAT THE TAKING OF SUCH TIMBER COULD NOT BE REGARDED AS AN INNOCENT TRESPASS CALLING FOR THE APPLICATION OF THE MORE LENIENT MEASURE OF DAMAGES.

The Court instructed the jury as follows:

"The defendant seeks also to justify the cutting and removing of the timber from the S. E. ¼ of Section 28, Township 14 North, Range 14 West, by reason of the

fact that the same was embraced within the Homestead Entry of one Henry F. Edgar—commonly referred to in the evidence as the Edgar Claim. The evidence shows without controversy that Edgar did not perfect the homestead right so initiated and did not receive a patent for said lands, but that the same reverted to the United States and the said Edgar lost all of his rights in the land and the timber growing thereon at the time of the initiation of his entry. In this connection you are instructed that a settler on public land covered by an unperfected homestead entry who cuts and removes timber therefrom, other than for necessary buildings and improvements and clearing for cultivation, is in law a willful trespasser, without regard to the question of his good faith in making the entry, and if you find that the defendant, or any of the corporations or persons associated with him, acting under his direction and control, cut and converted the timber in question from the S. E. ¼ of said Section 28, whether with the consent of Edgar or not, then the defendant is liable for the full value of the timber so cut and carried away at the time it was sold."

A. of E. No. 5, supra 18.

This instruction was erroneous in that it told the jury that Edgar was necessarily a willful trespasser and that Edgar, and the defendant for that matter, would, therefore, be subject to the higher measure of damages consequent therefrom. If Edgar mistakenly believed he had the right to cut timber from his claim, which he might very well have believed in view of the making of his final proof and the payment of his four hundred dollars, neither he, nor those purchasing from him, if they likewise were innocent, would be chargeable on any other basis than as for an innocent trespass. Whether this was Edgar's belief and those purchasing

from him, should have been left for the jury to determine, which was not done.

Under Topic II above, the facts concerning the Edgar claim, are marshalled under the sub-head of "Edgar claim", and need not now be further considered. The facts are such as to bring the case well within the rule recently announced by the Circuit Court of Appeals for the Eighth Circuit in the case of

H. D. Williams Cooperage Co. v. U. S. 221 Fed. 234.

Holding that one situated as was Edgar is not necessarily a willful trespasser and that it should be left to the jury to determine whether he was guilty of an innocent or willful trespass.

TOPIC VII.

THE COURT ERRED IN INSTRUCTING THE JURY THAT IN ORDER TO JUSTIFY THE TAKING OF TIMBER FROM THE HELL GATE LANDS THAT, AMONG OTHER THINGS, THEY MUST FIND THE LAND FROM WHICH SAID TIMBER WAS TAKEN TO HAVE BEEN MORE VALUABLE FOR THE MINERAL THEREIN THAN THE TIMBER GROWING THEREON.

We submit that the decision in the case of U. S. v. Plowman, 216 U. S. 372; 54 L. Ed. 523, did enough to limit the territory to which the Act of June 3, 1878, might be applicable without requiring that lands be subjected to the comparative test of value for the timber growing thereon or the mineral contained therein. This portion of the instruction is assigned as error (A. of E. No. 4, Subdivision C).

We submit that for the purposes of this Act it should be enough that the character of the lands was such that a person of ordinary prudence would be justified in the expenditure of his labor and means, with a reasonable prospect of success, in developing a mine which might become valuable as the country settled up.

We are not asking this Court to overrule the Supreme Court of the United States, but we do submit that the trifling benefit left in the Act by Mr. Justice Holmes' decision should not be further frittered away.

The Court we are addressing has already through its decisions shown its appreciation of the conditions in the western states with reference to the necessities which led to the enactment of the Mineral Land Act of June 3, 1878. On the same day as the Act last mentioned was passed the Timber and Stone Act was also enacted. The so-called Timber and Stone Act of June 3, 1878, Ch. 151, 20 Stat. L. 89, as originally enacted, was limited in its operation to the States of California, Oregon, Nevada and Washington Territory. The Act of August 4, 1892, Ch. 375, Sec. 2; 27 Stat. L. 348, extended the Timber and Stone Act to all "public land states". Nor was it, as we have seen, under Topic II herein, until 1891, that the Acts of March 3, 1891, were enacted, which conferred the power upon the Secretary of the Interior to issue permits for the cutting of timber on the public domain. It will thus be seen that so far as Montana and the public land states were concerned other than California, Oregon, Nevada and Washington Territory, the Mineral Land Act of June 3, 1878, furnished the only means by which the settlers could obtain timber

for mining, manufacturing, agricultural or domestic uses, save, as under the Howestead Law, land with timber growing therein and might be taken up for farm and residence purposes.

For a time it was questioned whether or not the Mineral Land Act of June 3, 1878, by reason of the inclusion of the phrase "other mineral districts of the United States" therein, did not apply to mineral districts outside of the enumerated states. The Land Department so held consistently, but finally succumbed to the repeated rulings of the Federal Courts to the contrary.

38 Land Dept., Dec. 75.

We, therefore, take the position that in order to effectuate the obvious intention of Congress to give substantial relief to Montana and other districts similarly situated, the test in determining whether lands were of a character sufficiently mineral to come within the terms of the Act is not whether they were more valuable for the timber growing thereon than the mineral contained therein, but merely whether the prospect of developing a mine or other mineral deposit—such as coal lands, etc.—was such as to warrant a prudent person in expending money for that purpose.

Chrisman v. Miller, 197 U. S. 313; 49 L. Ed. 770;

Steele v. Tanana Mines R. Co., 148 Fed. 678; 78 C. C. A. 412.

In the practical application of the Act of June 3, 1878, no comparative tests are necessary. The Act did

not purport to give, nor did it give any exclusive right to the person cutting timber thereon as against a settler, locator of a mining claim, or purchaser under the Timber and Stone Act or even as against another person cutting timber thereon. It is only where contests arise between persons claiming antagonistically and exclusively that a comparative test need be resorted to.

The operation of the Timber and Stone Act by analogy furnishes an illustration, though there in order for that Act to apply the land had to be either "valuable chiefly for timber" or "valuable chiefly for stone", as the case might be, and so it was held that lands were "chiefly valuable for stone" and subject to entry under said Act regardless of whether or not the stone could, under existing conditions, considering the cost of quarrying and transportation, be marketed at a profit.

34 Land Dept., Dec. 123.

In thus ruling the Department held that to adopt any other construction of the Act would make it read as though Congress had said "lands commercially valuable, chiefly for stone" and the Department well points out that it not infrequently happens in farming that when the farmer has raised his crop he does not sell it for enough to pay the cost of production and transportation, but nevertheless it does not follow that the lands are not valuable for agricultural purposes. Surely by the Mineral Act of June 3, 1878, Congress at least intended that the inhabitants of the State of Montana might cut timber for the purposes mentioned in the Act from lands which in the then undeveloped state of the West might not entice, as a business proposition,

the investment of money in exploitation of such lands for the mineral therein and which for that reason were at the moment more valuable for the timber growing thereon than the mineral contained therein.

See also

U. S. v. Budd, 144 U. S. 154, 167; 36 L. Ed. 384; Thayer v. Spratt, 189 U. S. 346; 47 L. Ed. 845.

TOPIC VIII.

ERRORS COMMITTED BY THE COURT IN THE RECEPTION AND REJECTION OF CERTAIN EVIDENCE.

1. The Court erred in refusing to permit the witness, W. H. Hammond, to testify as to the terms of the lease under which he rented the Bonner Mill from Blackfoot Milling & Manufacturing Company.

Concerning the history of the Bonner Mill, we have seen (supra pp. 80 et seq.) that W. H. Hammond was sole owner of it until February, 1888, when Blackfoot Milling & Manufacturing Company was incorporated to take it over. W. H. Hammond became a stockholder to the extent of about one-fourth in the new company and as part of the consideration for the transfer of the mill property to the company it was agreed that he should have a lease on the mill for two years, with the privilege of three, and such lease was actually entered into (Tr. pp. 434-5).

For the purpose of substantiating the *bona fides* of this transaction defendant offered in evidence the lease dated, Feb. 10, 1888, from Blackfoot Milling & Manu-

facturing Company to W. H. Hammond, which the witness, W. H. Hammond, identified as the lease to which he had referred in his testimony (Tr. 435-6). The Court sustained the objection of plaintiff to the admissibility in evidence of said document on the ground that its execution was not sufficiently proved, it having no corporate seal and not being acknowledged. Defendant thereupon offered the document in evidence as the document or fact that caused W. H. Hammond to take possession of the mill property, but it was denied admission on that theory, to which ruling defendant excepted.

Defts. Excp. No. 4; A. of E. No. 29; Tr. p. 436.

Thereupon witness, W. H Hammond was asked by defendant to state from his recollection what the terms of the instrument were of which he had a duplicate copy, his copy having been lost in the fire of 1906. Defendant contended that the question was proper (Tr. 437-8); that the existence of the document went to the question of the good faith of witness in everything he did and in so far as the acts of the witness were imputable to any party to this action, that it was a proper subject of inquiry, but the Court sustained plaintiff's objection.

Defts. Excp. No. 5; A. of E. No. 30; Tr. p. 438.

Witness, W. H. Hammond, was then asked by defendant how much rental he paid when he was operating under the lease, as to which he had testified; but the Court sustained plaintiff's objection thereto.

Defts. Excp. No. 6; A. of E. No. 31; Tr. pp. 438-40.

Defendant then asked witness, W. H. Hammond, to whom did he pay rental—witness testifying that he paid rental—but the objection of plaintiff was sustained thereto.

Defts. Excp. No. 7; A. of E. No. 32; Tr. p. 439.

Defendant then asked witness, W. H. Hammond, whether there was any provision of any kind for the extension of the original lease, but the objection of plaintiff was sustained thereto.

Defts. Excp. No. 8; A. of E. No. 33; Tr. p. 439.

Defendant then asked witness, W. H. Hammond, if he ever operated the property under what purported to be an extension of the lease, but the objection of plaintiff thereto was sustained.

Defts. Excp. No. 9; A. of E. No. 34; Tr. pp. 439-40.

We contend that irregularity in the execution of the lease should not have prevented its admission in evidence as the document or fact under which the witness, W. H. Hammond, held possession of the premises, and that witness, W. H. Hammond, should have been allowed to testify as to its terms. Why should he not have been allowed to testify as to the amount of rental he paid and to whom he paid it? This line of testimony was offered to establish the *bona fides* of the interest of W. H. Hammond as lessee and of Blackfoot Milling & Manufacturing Company as owner and lessor; also as bearing on the relationship of defendant to the property. It tended strongly to negative the theory of plaintiff (supra p. 51), that the several corporations and individuals were designed merely to furnish a

cloak for the operations of defendant. The testimony was relevant for this purpose and we submit prejudicial error resulted from its exclusion.

2. The Court erred in denying the admission in evidence of two affidavits made by miners concerning the mineral character of the Hellgate lands in connection with the testimony of G. W. Fenwick, who testified that these affidavits among other things furnished the basis for his bona fide belief that the lands were mineral.

The question whether or not G. W. Fenwick in good faith believed the Hellgate country, over which he was about to cut, to be mineral lands was, of course, one of the issues in the case. He testified (Tr. 557-60), that before he purchased the Bonita Mill he had seen several affidavits regarding the mineral character of that section of the country and that these affidavits among other things constituted the basis of his belief that the land was mineral land. He testified that he could identify two certain affidavits, one made by H. A. Ameraux and the other by William H. Smith, as having been seen by him (the witness), and thereupon defendant offered said affidavits in evidence, but the Court sustained the objection of plaintiff thereto upon the ground that the affidavits were and each of them was an ex parte statement by which plaintiff could not be bound.

Defts. Excp. No. 13; A. of E. No. 36; Tr. p. 562.

The affidavits are set forth in Tr. pp. 560-2 and the territory described therein, namely, the country lying along the line of the Northern Pacific Railroad from Missoula to the Town of Bearmouth, embraced the cut-

ting done by Fenwick. We submit the fact that these affidavits were ex parte statements is of no consequence here. So long as the witness, Fenwick, had testified they constituted one of the elements which induced him to believe the lands he was about to cut on were mineral lands within the then understood meaning of the Act of June 3, 1878, and so long as such affidavits might reasonably tend to induce such belief (which cannot well be gainsaid) we contend they were admissible in evidence in support of the bona fides of Fenwick's expressed belief, and that it was prejudicial error to deny the admission of these affidavits in evidence.

3. The Court erred in requiring defendant to testify concerning the extent of his wealth and more particularly as to what his holdings in Missoula Mercantile Company were worth in the year 1906.

Defendant, while on the stand as a witness in his own behalf was, on cross-examination, required by the Court to answer a series of questions which we think were permitted wholly without justification in law and certainly were highly prejudicial. While on cross-examination defendant testified that he was indirectly still a stockholder in Missoula Mercantile Company, that is to say, that he owns stock in a company that owns stock in Missoula Mercantile Company, but that he "continued personally to own stock directly in Missoula Mercantile Company until (I think) three or four years ago" (Tr. p. 706). A description of Missoula Mercantile Company and defendant's relation thereto will be found at page 88, supra.

He was asked the following question:

> "Q. How much did you ultimately realize from the sale of your interest in Blackfoot Milling & Manufacturing Company; Big Blackfoot Milling Company; the Montana Improvement Company and the Missoula Mercantile Company?" (Tr. 706-7).

To this question defendant objected on the ground that it was irrelevant, incompetent and immaterial and not cross-examination; that it was furthermore an incompetent inquiry as to the private affairs of a citizen upon cross-examination, which amounts to an inquisition, as against which he is guaranteed under the Federal Constitution. The Court overruled defendant's objection.

Defts. Excp. No. 16; A. of E. No. 39; Tr. p. 707.

The witness answered this question as to Montana Improvement Company and Blackfoot Milling & Manufacturing Company.

Defendant was then asked how much he ultimately received out of the sale of Big Blackfoot Milling Company. The same objection was interposed and the defendant was required to answer.

Defts. Excp. No. 17; A. of E. No. 40; Tr. p. 708.

Finally, defendant was compelled to testify that his stock in Missoula Mercantile Company was worth at least $250,000.00, or $300,000.00, at the time he exchanged it for stock in the holding corporation, which acquired the stock of Missoula Mercantile Company—and this, be it remembered, was at a time only three or four years prior to the time at which defendant was testifying, that is to say, as of the year 1906 or 1907.

In other words, defendant was not only required to testify as to what his holdings in Missoula Mercantile Company were worth (which was in itself most objectionable) but what they were worth some twelve or thirteen years after the close of the period covering the conversions alleged in the complaint.

Defts. Excp. No. 18; A. of E. No. 41; Tr. p. 708;
Defts. Excp. No. 19; A. of E. No. 42; Tr. p. 709;
Defts. Excp. No. 20; A. of E. No. 43; Tr. p. 710.

We submit that this inquiry was grossly unfair and prejudicial. It it not often that the financial status of a defendant becomes a relevant question. There was nothing here to make it so. No one can question the highly prejudicial character of the testimony. Not only was defendant thereby subjected to the odium attaching to a malefactor of apparent wealth, but more specifically, bearing the seal of the Court's approval as to its relevancy, this testimony plainly suggested to the jury that defendant having prospered and still prospering in his activties in Montana could well afford to make restitution to the Government for any conversions committed by those with whom he was more or less associated in business and with whom Missoula Mercantile Company presumably had profitable dealings.

4. The Court erred in admitting in evidence part of the duplicate assessment books of the County of Missoula relating to the assessment of Missoula Mercantile Company.

Over the objection of defendant plaintiff offered in evidence part of the duplicate assessment books of the

County of Missoula relating to the assessment of Missoula Mercantile Company during the years 1890 to 1895 inclusive.

Defts. Exception No.	A. of E. No.	Trans. p.
01-A	51	404
01-B	52	405
01-C	53	406
01-D	54	406
01-E	55	407
01-F	56	408
01-G	57	408

The admissibility in evidence of these tax assessments was objected to upon the ground that the same were, and each of them was, incompetent, irrelevant and immaterial, hearsay, and *res inter alios acta.*

The facts concerning the making up of the tax assessments are set forth at length supra pages 110-113 and we submit the point made above without further argument. If as we there contend the force, if any, of this evidence was neutralized through the introduction by defendant of other evidence in relation thereto, we cannot reasonably contend that the erroneous admission of this evidence was prejudicial, but, should the Court not regard our evidence as accomplishing this, then we insist on our objection to the inadmissibility of these tax assessments.

TOPIC IX.

THE COURT ERRED IN OVERRULING THE AMENDED DEMURRER TO THE COMPLAINT.

An amended demurrer (Tr. p. 17) was interposed to the complaint, which demurrer was overruled and the

action of the Court in so doing is assigned as error (A. of E. No. 1).

A general outline of the complaint is set forth pages 1 to 4, supra.

1. The complaint stated no cause of action against defendant.

It is alleged in paragraph 3 of the complaint (Tr. p. 2) "that defendant entered upon the aforesaid lands and cut down, felled and removed and caused to be cut down, felled and removed, timber that had been standing and growing upon said lands and manufactured and caused to be manufactured the same into lumber. That said defendant in committing the acts in this paragraph last mentioned acted as the general manager in charge of and directing all the business of" two certain corporations.

It is further alleged in paragraph 9 (Tr. p. 5) that the timber was manufactured into lumber by defendant at mills operated and owned by the said corporations and conducted and managed by the said defendant, "the cutting having occurred under the immediate direction and control of defendant" and the lumber "having been manufactured under the direction and control of defendant". As will be observed the allegations as to defendant's relation to the cutting and manufacturing of the lumber in question are not direct—are mere participial pleading—and must be disregarded.

Paraphrased, this means that the cutting and manufacturing was done by two certain corporations and that defendant, acting as the general manager of and directing all of the business of these corporations, di-

rected and controlled the business of these corporations.

It is to be observed that there is no allegation that defendant personally participated in the cutting and manufacturing of the lumber and all the allegations, direct and indirect, amount to no more than that defendant was an agent of these two corporations—an agent, if you like, with as extensive powers as the fundamental nature of corporate organization and Government permits—but still an agent and not a principal.

Defendant's relation to these corporations and the act or acts of conversion is also made the subject of special demurrer par. 52-60 (Tr. p. 56).

What then, is the liability of an agent for the tort of his principal? That has been considered in Topic II, supra.

In the case at bar it cannot be pretended that the complaint charges defendant with personally participating in the physical acts of cutting the timber and manufacturing it into lumber; there are no sufficient allegations that defendant personally directed such cutting and manufacturing or either of them; the recital or participial allegation about the cutting of the lumber "having occurred" and the lumber "having been manufactured" under the direction and control of defendant, if it can be considered at all by reason of its form and lack of directness, is no more than a definition of the scope of defendant's employment—in other words, that defendant's employment was such that this cutting and manufacturing would have been under his direction and

control. It is not the equivalent of the allegation that defendant personally participated in the cutting and manufacturing of the lumber; nor is it the equivalent of an allegation that defendant affirmatively directed the cutting and manufacturing of the lumber.

2. The complaint lacks the essential requirement of certainty.

As has been noted in our general review of the complaint at pages 1-4 supra, two distinct bodies of land were involved and of this, of course, the trial Court could take judicial knowledge when the amended demurrer to the complaint was heard, but the complaint leaves us in the dark as to when during a period of ten years ending January 1, 1895, the timber alleged to have been cut and manufactured was in fact cut and manufactured; or from which body of land or from which of the several sections comprising each, or the Governmental subdivisions thereof into forty acre tracts, the timber was taken.

The complaint in nowise attempts in any way to charge any part of the conversion or trespass specifically to either company or the defendant in connection therewith, and the plaintiff admits that it cannot state what cutting and what manufacturing of lumber from the timber cut occurred in particular months or in particular years or what appropriation of its timber or its lumber occurred in particular months or in particular years. It is alleged, however, that the estimate of the timber and lumber taken from the lands is ascertained and stated in the complaint from actual stumpage measurement on the ground, par. 9 (Tr. p. 5).

It is alleged, par. 10 (Tr. p. 6), that the trespasses and wrongful acts of the defendant alleged to have been committed by him were continuing in their nature and constituted and were in pursuance of a plan on the part of said defendant and the said corporations to cut and appropriate and manufacture into lumber the timber cut from plaintiff's lands.

We respectfully submit that certainty in the time, place and amount of the conversion or conversions and as to the particular corporation guilty thereof is required in the details pointed out in our demurrer, and that in their absence the special grounds of demurrer as well as the general demurrer for want of facts should be sustained.

The code has not changed this common law requirement of certainty. It was said in Siegel-Campion Co. v. Holly, 44 Colo. 580; 101 Pac. 68:

> "While the Code abolishes the distinction between different forms of action, the complaint for a conversion of property under the Code must now contain all the material allegations which were necessary in an action of trover at Common Law."

In a case arising out of the Mutual Life Insurance Company scandals the appellate division of the Supreme Court of the State of New York reversed the decision of the trial Court, which denied a motion to make the complaint more definite and certain—the latter procedure being improper under our practice and such defects being reached by demurrer for ambiguity, uncertainty and unintelligibility.

The Court said:

> "In the second count the plaintiff alleges its incorporation and that 'between the 1st day of January, 1893, and the 17th day of November, 1905, the defendants, acting jointly, wrongfully and without authority, took certain money, the property of the plaintiff, consisting of checks, bank bills, United States notes, treasury notes, gold and silver coin, of the amount and value of $500,000, and converted the same to their own use to the damage of plaintiff' in the sum of $500,000. I am of opinion that this count should be made more definite and certain. It is possible that the conversion of this property constituted only a single transaction but that is highly improbable. It is not alleged to have been converted all on the same date, but during a period covering nearly thirteen years. Various kinds of property is involved and the amount is very large. The reasonable inference is that this wrong was not a single act of conversion but many acts at different times, quite remote and disconnected one from another. The count should be further made more definite and certain with respect to the time, and with respect to whether it is claimed that the property was converted by a single act or transaction, and, if there was more than one conversion, the causes of action should be separately stated and numbered."
>
> Mutual Life Ins. Co. v. Raymond, 103 N. Y. Supp. 839.

As to the uncertainty, unintelligibility and ambiguity in the complaint, which is attacked by the amended demurrer from every point of view, we briefly direct the Court's attention to the following specifications in the amended demurrer (Tr. p. 17).

That it does not appear between what time or times within the ten (10) year period named in the complaint, the timber or any thereof was felled (5, 6, 7), or was manufactured and sold (8), or was appropriated

by defendant, used, or sold (9, 10, 11), nor how much of the timber and lumber alleged to have been converted was converted by each company (12, 13, 14), nor whether by "The Montana Improvement Company, Limited," from all or only certain of the lands described in the complaint (15, 16, 17), or in other words, from which of the described lands was the timber taken by this company (18, 19, 20); so, as to "The Blackfoot Milling and Manufacturing Company," was timber taken by it from all the lands described in the complaint or only from certain of said lands (21, 22, 23), or, in other words, from which of the lands described in the complaint was timber taken by this company (24, 25, 26)?

As bearing upon the locality from which the timber was taken, irrespective of the person felling it, we point out that it does not appear how much was taken from the water shed of the Big Blackfoot River or how much was taken from the water shed of the Hell Gate River (27, 28, 29)—territories that are geographically, topographically, geologically and commercially distinct and separate the one from the other. And the same uncertainty is assigned in terms of the governmental subdivision of lands (30, 31, 32). These last grounds of demurrer may be eliminated from consideration if the next two grounds of demurrer are sustained by the Court. We contend that the Government should have been required to state in its complaint the amount of timber it claims has been cut off each quarter of every quarter section of land described in the complaint. As the Court knows, judicially and otherwise, such forty

acre tract is the smallest sized subdivision of which entry may be made under the Homestead and other settlement laws. In a word, it is the unit of measurement.

We submit our demand that the Government state just how much timber they claim was cut off each quarter section *and when* was entirely reasonable and was necessary in fairness to the defendant to enable the preparation of his defense. It is to be remembered that the complaint admits that actual stumpage measurement had been made on the ground. In this particular at least, the Government's ignorance could not excuse it. Having these thoughts in mind we, therefore, took objection to the complaint in that it does not state the amount of timber which the Government claims to have been cut on each quarter section—160 acres—(33, 34, 35), though we submit we are entitled to know the amount claimed to have been cut off each quarter—forty acres—of each quarter section embraced in the land described in said complaint (36, 37, 38).

The demurrer points out as a defect, that it cannot be ascertained from the complaint whether one or several acts of conversion are complained of (39, 40, 41), and the place or places of such acts of conversion (42, 43, 44), or where the mills were situated where the lumber was manufactured (45, 46, 47), or as of what place the value of the manufactured lumber is computed (48, 49).

As a matter of common fairness plaintiff in this case, by reason of the great lapse of time since the commis-

sion of the conversions complained of and of the further fact that defendant was at best only constructively liable for the acts of others, should voluntarily have given all available details as to the time, place, manner and amount of each conversion, and failing in this, the trial Court should have compelled plaintiff to do so by sustaining our demurrer. As it was, defendant was put to many hundreds of dollars extra expense in investigation and in the taking of testimony by reason of the vagueness of the charges made and indeed, it may be doubted whether this lack of precision in the complaint did not finally result in the interposition of a defense less perfect than would have been possible had the complaint contained the detail which we contend the law requires. It will be noted that while plaintiff took many depositions in Montana it never disclosed the amounts claimed to have been taken from the several sections of land until the time of the trial, and efforts on the part of defendant, outside the courtroom, to obtain from plaintiff this information, which the complaint alleged the Government had in its possession at the time the complaint was filed, were wholly unavailing.

Plaintiff sought to get away from the ordinary requirement of certainty as to the time, place, amount of each conversion during this period—in other words, from the principle laid down in Mutual Life Insurance Company v. Raymond, 103 N. Y. Supp. 839, supra—by the simple expedient of alleging (Paragraph X, Tr. p. 6) that these wrongful acts were continuing in their nature and were in pursuance of a plan. We submit that these allegations are but mere conclusions of law

and in any event are without significance. Apart from the amount of timber taken from the respective tracts of land, which plaintiff admits in its complaint was known to it, the time of the taking as to each tract was obviously susceptible of much more exact statement than that it was done at divers times during a ten year period which antidated the commencement of the action by at least fifteen years. By this allegation of continuity and plan plaintiff preliminarily, and as a matter of pleading, seeks to escape from the requirement of certainty in the complaint and then on the trial when plan and conspiracy are not proved we are told that a cause of action is stated anyhow and that the rest—including allegations describing the capacity in which defendant committed the conversions—is mere matter of inducement or surplusage, which may be disregarded.

We are not asking that the United States be held to any impossible requirements of certainty, although if there has been a great lapse of time since the commission of the conversion and the bringing of the action we do not see why this Court should deduce a rule of special convenience to this plaintiff already much favored by immunity from the statute of limitations. That the United States as a party plaintiff is bound by all the rules of pleading applicable to an individual is set forth in Topic V. supra. It is to be borne in mind that the United States as a party plaintiff has no monopoly of inconvenience resulting from such lapse of time. On the contrary it has at its command inexhaustible financial resources, the best legal talent obtainable, and

finally its own judicial officers who may be relied upon to see that it gets a square deal.

If this Court will read paragraphs IX. and X. of the complaint (Tr. pp. 5 and 6) it will be seen that the allegations therein by which plaintiff attempts to excuse itself from the necessity of pleading with the requisite certainty, would be much more appropriate if this suit were one in equity for a discovery and an accounting.

Once upon a time this plaintiff did attempt to frame a suit in equity involving timber trespasses in Montana and the Court we are addressing very properly held that equity had no jurisdiction of such a case and this decision was affirmed by the United States Supreme Court.

> U. S. v. Bitter Root Development Co., 133 Fed. 274; 66 C. C. A. 652; 200 U. S. 451; 50 L. Ed. 550.

If the loose allegations in the complaint herein are to be held sufficient, then, we might as well frankly recognize that all that is required of the United States as a party plaintiff in an action for the conversion of timber is to allege that somewhere in the United States prior to the commencement of the action defendant converted so many million feet of lumber which at the time was the property of the United States and that said lumber was of a specified value. Should it happen that defendant has dealt in lumber or has sustained some remote relation to those who have dealt in lumber, then he will be well advised to compromise

the case, otherwise he will have to face trial without knowing what charge he is called upon to meet.

Without specifically drawing this Court's attention to the same an examination of the amended demurrer will show that the several elements of uncertainty existing in the complaint were raised in every conceivable form, also the question as to whether several causes of action therein were improperly united and that several causes of action were stated together in the same count.

TOPIC X.

THERE WAS IRREGULARITY ON THE PART OF THE COURT IN PERMITTING THE PARTIAL RE-READING TO THE JURY OF THE TESTIMONY OF THE WITNESS W. H. HATHAWAY AFTER THE JURY HAD RETIRED TO DELIBERATE ON ITS VERDICT.

The jury retired for deliberation Friday, February 7, 1913, at 3.05 o'clock P. M. The next morning at 10.10 the jury returned into Court and the foreman stated that the jury would like to have read to it the testimony of the Government witnesses Hathaway, Mitchell and Moser. Thereupon the entire testimony of the witness Mitchell was read to the jury and a part of the direct testimony of the witness Hathaway from the beginning of his testimony to the first question and answer on the top of page 206 of the transcript. Thereupon the Court interrupted the further reading of the testimony and indicated its disapproval of the matter. Defendant's counsel took the position that to stop at this point would be most unfair to defendant (Tr. 783), as this

witness Hathaway in his cross-examination directly contradicts some of the statements he made on his direct examination. The Court finally permitted the reading to proceed, stating that they might finish the testimony of the witness Hathaway. Thereupon, the balance of the testimony of the witness Hathaway given on direct examination was read and the Court retired from the courtroom for a few minutes during which time the jurors consulted among themselves. Upon the return of the Court the foreman of the jury stated that the jury had come to the conclusion they did not require the reading of the testimony of the witness Moser and wanted to know was there any way in which counsel could agree not to read the rest of the testimony of the witness Hathaway. The Court told the jury that counsel had nothing to say about it and that it was for the jury to say about what they wanted to have their minds refreshed. The foreman stated the jury did not wish to hear any more testimony of the witness Hathaway and the Court said: "Very well, we will stop." Thereupon, defendant offered to read the cross-examination and recross-examination of the witness Hathaway and particularly that portion of the testimony of said witness Hathaway relating as to what disposition was made of the product of the Bonita Mill, but the Court refused to permit the reading of such cross and recross-examination, to which ruling of the Court defendant excepted.

This ruling is assigned as error (A. of E. No. 2) and the transaction in question will be found at Tr. pages 781-785.

It so happened that the effect of shutting out the reading of the cross and recross-examination of the witness Hathaway was peculiarly prejudicial to defendant inasmuch as that he flatly contradicted what he had said on direct examination in a number of important points. If this was error there can be no doubt about its prejudicial character. That it was reversible error is squarely held in

Hersey v. Tully, 8. Colo. App. 110; 44 Pac. 854.

The following extracts from the opinion in that case sufficiently show the reason for the rule:

> "Some time after the jury had retired, a verdict not having been reached, they were brought into Court, and requested further instructions in the nature of information concerning a portion of the evidence. The stenographer then, by direction of the Court, and against the objection of the defendant, read to the jury from his notes the testimony of the plaintiff that the defendant had told him over the telephone that he would be responsible for the work. The jury thereupon again retired, and agreed upon a verdict in the plaintiff's favor. * * *
>
> "But, without regard to any question of the legal effect of this testimony, it was serious error to permit it to be read to the jury after the case had been submitted to them. They thus heard a portion of the plaintiff's testimony twice, and the last time disconnected from all the other evidence, so that they went back to their room with their memories refreshed as to this; and having listened to it out of its connection, they would be liable to give it an importance to which it was not entitled, and which they would not have given it otherwise. Upon each of the two grounds, namely, the error we have noticed and the insufficiency of the evidence, the verdict should have been set aside and a new trial granted."

The ruling was approved in the later case, in the same Court, entitled:

Fairbanks v. Weeber, 15 Colo. App. 268; 62 Pac. 368.

To the same effect is:

Padgitt v. Moll, 159 Mo. 143; 52 L. R. A., 854.

TOPIC XI.

THE COSTS, TAXED AT $1617.48, ARE EXCESSIVE AT LEAST IN THE SUM OF $108.30, AND HEREIN THE COURT WILL BE ASKED TO CONSIDER THE PROPRIETY OF THE UNITED STATES AS A PARTY RECOVERING ANY COSTS.

This Court and the Supreme Court of the United States have by their respective rules declared that when the United States is a party costs shall not be recoverable either for or against the United States or the other party to the litigation.

In any event the costs taxed were excessive in the sum of $108.30 (A. of E. No. 58).

The bill of exceptions to the order taxing costs will be found at Tr. 788.

It will be noted that as to seven certain witnesses coming from without the Northern District of California their mileage allowance was computed upon the mileage actually and necessarily traveled by said witnesses within the district, whereas, we contend, the proper mode of computation was to allow not to exceed one hundred miles coming and one hundred miles returning for each witness, that is to say, not to exceed the sum

of $10.00 for each witness, thus the witness Mitchell coming from Washington was allowed 806 miles in the State of California, or $40.30, it being 403 miles from the Oregon State line to San Francisco by railroad. The Government witnesses coming from Montana were allowed on a basis of mileage from where the Central Pacific Railroad enters the State of California from Nevada.

The presentation of this point concerning which the Federal Courts in the ninth circuit are not in harmony is, considering the amount involved, done more in pursuance of what the writer conceives to be his duty to the profession and the Court and to bring about the settlement of a vaxatious point in dispute than for the pecuniary advantage of his client.

It should be said that Rule 71, Subdivision 7, of the Court in which this case was tried, at the time this case was tried, provided as follows:

> "7. In taxing costs, the following rules (among others) shall be observed:
>
> "(a) The fees of witnesses for actual and proper attendance shall be allowed, whether such attendance was procured by subpoena or was had voluntarily.
>
> "(b) Where a witness has attended from a point *without the district,* his mileage shall be taxed according to the distance *actually and necessarily travelled by him within the limits of the district.*
>
> "(c) The mileage of witnesses attending from points within the district shall be taxed according to the distance actually and necessarily travelled. * * *"

The taxation as made was in accord with Subdivision B of Section 7 of said Rule 71. The question is as to

whether the rule is valid or not, for, of course, the matter is controlled by the Revised Statutes of the United States.

The cases in the trial Federal Courts in the ninth circuit in which varying conclusions have been reached are as follows:

N. D. Cal. Haines v. McLaughlin, 29 Fed. 70;
S. D. Cal. Lillenthal v. So. Cal Ry. Co. 61 Fed. 622;
Dist. of Nev. Hanchett v. Humphrey, 93 Fed. 895;
Dist. of Oregon, U. S. v. S. P. Co., 172 Fed. 909;
Dist. of Mont., Hunter v. Russell, 59 Fed. 964;
Dist. New Mexico, U. S. v. Green, 196 Fed. 255.

Error has not been assigned so far as concerns the allowance of costs at all in an action in which the United States is a party, but this Court may notice a plain error even though it be not assigned. We suppose it will be said that the matter is too well settled—and settled by the Supreme Court of the United States that the United States as a party to an action is permitted to recover costs in its favor should it prevail, while its opponent, should he be successful, is not entitled to any costs—to permit of a consideration of the question.

Pine River Logging Co. v. U. S. 186 U. S. 279; 46 L. Ed. 1164;
U. S. v. Sanborn, 135 U. S. 271; 34 L. Ed. 112.

Nevertheless, the Supreme Court seems to have been satisfied merely to follow what had been the prevailing

practice in the trial Courts of the United States rather than to consider the question fundamentally. The Court last mentioned has by rule provided that no costs shall be allowed in that Court for or against the United States (Rules of the U. S. Supreme Court, No. 24). A like rule is found in all the Circuit Courts of Appeal.

The gross injustice of allowing costs to the United States and none against it, is hard to tolerate with patience.

In the case of United States v. Davis, 54 Fed. 147, 4 C. C. A. 251, decided by the Circuit Court of Appeals for the eighth circuit, it was said (p. 153):

> "At common law, costs, strictly speaking, are not recoverable as an incident to the judgment on the issues litigated. They are recoverable only when authorized by the statute. General statutes providing for the recovery of costs by the prevailing party have been held not applicable to the state or national governments, the principal ground for this ruling being the fact that the government in the absence of direct statutory authority, is not liable to be sued by its citizens. In England it was considered the prerogative of the King not to pay costs *and beneath his dignity to receive them.* 3 Cooley, Bl. 400."

If not the dignity of the Government—then at least its respect for fair play, demands that a like stand be taken in the Courts of the United States.

TOPIC XII.

CONCLUSION. THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED; FAILING IN THIS, THE JUDGMENT SHOULD BE REVERSED AND A NEW TRIAL ORDERED UNLESS DEFENDANT IN ERROR CONSENT TO A MODIFICATION AND REDUCTION IN THE AMOUNT OF THE JUDGMENT TO THE SUM OF $16,000.00.

We contend for the many errors committed by the trial Court and which prevented defendant from having a fair trial the cause should be reversed and a new trial ordered, which will be, of course, subject to such rulings as this Court may determine on the questions discussed in this brief. However, should the Court not find that the errors committed compel this far-reaching result, then we contend that on no theory of the case should defendant be properly liable for a sum in excess of $16,000.00, and that the order of this Court should be such as that the judgment heretofore entered herein should be modified accordingly.

White v. United States, 202 Fed. 501, 121 C. C. A. 33, supra;

Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 771;

American Nat. Bank v. Williams, 101 Fed. 943, 947; 42 C. C. A. 101.

Dated, San Francisco,
January 22, 1916.

Respectfully submitted,

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APPENDIX I.

(A) THE STATUTORY LAW OF CALIFORNIA PRESCRIBING THE MEASURE OF DAMAGES IN CONVERSION.

That the rule announced by the Court is not the rule which has existed in California ever since the adoption of the codes, is perfectly clear.

Section 3336 of the Civil Code of the State of California declares:

> "The detriment caused by the wrongful conversion of personal property is presumed to be:
>
> "1. The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and
>
> "2. A fair compensation for the time and money properly expended in pursuit of the property."

The foregoing statute covers all cases of innocent conversion. Cases of willful conversion are treated on the theory of *punitive damages* and are covered by Sec. 3294 of the same code.

> Arzaga v. Villalba, 85 Cal. 193; 24 Pac. 656;
>
> Lightner Min. Co. v. Lane, 161 Cal. 705; 120 Pac. 771.

In Section 3336, relating to innocent conversions, were to be applied in the case at bar, it would be necessary to ascertain the value of the property "at the time of the conversion". The "time of the conversion" in tim-

ber cases is the moment when the tree is severed from the stump.

There is no case in the State Courts in California involving the conversion of timber. Judge De Haven, in United States v. McKee, 128 Fed. 1006,—a California case—makes no mention of the California statute. But the State Courts have recently passed upon the analogous case of the breaking down and conversion of gold-bearing ore.

> "For the wrongful conversion of personal property the damage allowed is its value 'at the time of the conversion', with interest, or, if 'the action has been prosecuted with reasonable diligence', the highest market value at any time between the conversion and the verdict, without interest, at plaintiff's option. (Sec. 3336.) Treating the case as one for the conversion of chattels, *the conversion was complete when the defendants had mined the ore and mingled it with ore from their own mine. Its value at that time would not include the cost of milling* * * * (p. 704).
>
> "The net result is that the verdict for fifty-four thousand dollars is excessive. It should have been for only twenty-seven thousand dollars, which the jury found to be the *value of the ore before mining and milling*" (pp. 706-7).
>
> Lightner Mining Co. v. Lane, 161 Cal. 689; 120 Pac. 771.

The foregoing decision makes it clear that, under the California rule in a timber case, the value "at the time of the conversion" would be the stumpage value.

In Nevada the rule, in cases of innocent conversion, is the same as in California. In Ward v. Carson River Wood Co., 13 Nevada, 62, the Court (per Judge Hawley) said:

"The taking of the wood by Hawkins and others, under the unauthorized sales, with the intent to convert it to their own use, amounted to a conversion. * * *

"The wood, as it was piled upon the ranches in Alpine county, belonged to the plaintiff and his predecessors in interest. It was there wrongfully converted by the defendant Hawkins and his predecessors in interest. *That was the place where the plaintiff's property was taken from him.* * * *

"There is nothing in this case, calling for any special or exemplary damages, and hence the true measure of damages which the plaintiff was entitled to recover, was the value of the wood *at the time of the conversion,* with legal interest from that day up to judgment."

Instead of instructing the jury that the measure of damages for innocent conversion is the value when the tree is first taken, with interest, the instruction complained of directed the jury, first, to find the *selling price* of the manufactured lumber, next to ascertain its cost of manufacture, and to bring in a verdict for the difference, with interest. *There was thus added to the statutory measure the element of profit upon the business of manufactuirng and selling lumber, with interest on that profit,*—an obvious and fatal departure from the statute.

Measured by the California rule, therefore, the instruction was erroneous.

(B) THE STATUTORY LAW OF MONTANA IN FORCE SINCE 1895 PRESCRIBING THE MEASURE OF DAMAGES IN CONVERSION.

The conversions alleged in the complaint are all claimed to have taken place prior to January 1, 1895.

The Civil Code of Montana went into effect at noon on the first day of July, 1895.

Civil Code of Montana, Section 4650.

Section 4333 of the Civil Code of Montana reads as follows:

> "The detriment caused by the wrongful conversion of personal property is presumed to be:
>
> "1. The value of the property at the time of its conversion, with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and
>
> "2. A fair compensation for the time and money properly expended in pursuit of the property."

It will be noted that the section just quoted is identical with the section of the California Civil Code upon the same subject.

It is to be further noted that Section 4651 of the Montana Code declares that no part of it "is retroactive, unless expressly so declared"; and also that Section 4654 declares that no right accrued is affected by its provisions.

As in the case of California, we have been unable to find any case in the State Courts of Montana involving the conversion of standing timber. Montana Courts, however, would unquestionably follow the construction of the statutory law by the Courts of California, seeing that the law was adopted as a whole from California, and in the case of Arzaga v. Villalba, 85 Cal. 191, 24 Pac. 656, supra, it was held, impelling the later ruling in the

case of Lightner Mining Co. v. Lane, 161 Cal. 705, 120 Pac. 771, supra, that the granting of punitive damages was referable to another Section of the code than that which defines the measure of damages for conversion. This result, of necessity, in cases of timber trespass, or underground mining trespass, makes the *time* of conversion referred to in the provision defining the measure of damages in cases of conversion relate to the time of the severance of the property from the freehold.

The case of Lynch v. United States, 138 Fed. 535, 71 C. C. A. 59 (ninth circuit) was one brought for cutting timber on the public domain in Montana subsequent to 1895. No mention is made of the Montana statute and the jury was instructed that if the conversion was an innocent one the Government was entitled to recover "merely the value of the timber as it stood on the land before being cut." Interest was neither sought nor allowed.

APPENDIX II.

THE CASE OF UNITED STATES V. ST. ANTHONY R. R. CO., 192 U. S. 524, 48 L. ED. 548, AND ITS RULING ON THE MEASURE OF DAMAGES, AS ILLUMINATED BY THE RECORD IN SAID CASE.

Fortunately for our purposes, the case in question went to the United States Supreme Court from the Circuit Court of Appeals for this circuit. The record, therefore, is here and available for the Court's examination.

See

Transcript of Record and Briefs, U. S. C. C. A. No. 731.

The Court will find that it was there stipulated that the value of the timber as it stood upon said lands when defendant caused the same to be cut was $1.50 per thousand feet. And it was further stipulated that "its value, upon delivery to defendant, was as alleged in the complaint", i. e., $12.35 per thousand feet. By the stipulation it was agreed that the following questions, among others, be submitted to the Court for its decision:

> "e. To what extent and for what amount is said railroad company liable, if at all, upon the above statement of facts and under the law as it shall be decided by the Court?"

The case was remanded for further proceedings, and it was the duty of the Court to fix the measure of damages which would give the Government its true measure.

In the brief filed in behalf of the United States in that case, the question of measure of damages is discussed on

pages 21 to 24, inclusive. This discussion begins: "Now, as to the second question, as to the measure of damages in case defendant committed trespass." Counsel for the Government, among other things, there declares (p. 21):

> "When the defendant is an unintentional or mistaken trespasser, or his innocent vendee (the measure of damages is) the value at the time of conversion, less what the labor and expense of defendant and his vendor have added to its value."

Citing:

> Bolles Wooden-ware Co. v. United States, 106 U. S. 432; 27 L. Ed. 230.

The defendant's discussion of the question of "Measure of Damages" will be found in the brief of the Defendant in Error, pages 21 to 31, inclusive, under the title of "Measure of Damages." Among other things they there contend (p. 22):

> "(1) When the defendant is a knowing and willful trespasser (the measure of damages is) the full value of the property at the time of bringing the action, with no deduction for his labor and expense.
>
> "(2) When the defendant is an unintentional or mistaken trespasser (the measure of damages is), the value at the time of conversion, less the amount which such trespasser has added to its value."

A review of the decided cases is made in the brief, among them United States v. Northern Pacific R. R. Co., 67 Fed. 890, relied upon by us here.

When the case went to the Supreme Court of the United States the same questions were presented. It is, therefore, idle to say that the St. Anthony Railroad

Case is not a direct authority upon the question here under consideration. It holds, and means to hold, that the measure of damages in cases of innocent conversion is the value of the timber converted *at the time and at the place where it is cut.*